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JSN
JAM
LXJ
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE COURTS OF

At. Brit.
Common Pleas & Exchequer Chamber,

WITH

TABLES OF THE NAMES OF THE CASES AND PRINCIPAL
MATTERS.

BY JOHN BAYLY MOORE,

OF THE INNER TEMPLE, ESQ.

VOL. XI.

CONTAINING THE CASES FROM MICHAELMAS TERM, 6 GEO. IV. 1825,

TO

TRINITY TERM, 7 GEO. IV. 1826, BOTH INCLUSIVE.

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J U D G E S
OF THE
COURT OF COMMON PLEAS,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

**The Right Hon. Sir Wm. DRAPER BEST, Knt., Lord Chief
Justice.**

The Hon. Sir JAMES ALLAN PARK, Knt.

The Hon. Sir JAMES BURROUGH, Knt.

The Hon. Sir STEPHEN GASELEE, Knt.

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ARGUED AND DETERMINED
IN THE
Courts of Common Pleas
AND
Exchequer Chamber,
IN MICHAELMAS TERM,

IN THE SIXTH YEAR OF THE REIGN OF GEORGE IV.

GENSHAM v. GERMAIN.

Wednesday,
Nov. 9th.

AN action having been brought by the plaintiff, an apothecary practising in *London*, for the amount of his bill, it was referred, by consent, to a barrister to ascertain the sum due from the defendant. He awarded the plaintiff 77*l.*, allowing, amongst other things, charges for attendances.

Mr. Serjeant *Taddy* now moved for a rule calling on the plaintiff to shew cause why the award should not be referred back to the arbitrator to strike out those charges, as the plaintiff, being only an apothecary, was not entitled to them. He cited the case of *Bonner v. Liddell* (a), where the Court held an award to be void, the arbitrator having exceeded his authority; and submitted, that, as the plaintiff could not have recovered the charges objected to, had the action proceeded, the arbitrator ought not to have allowed them.

An award cannot be objected to on account of any thing that does not appear on the face of it. Therefore, where an arbitrator had awarded to an apothecary in *London* charges for attendances, the Court refused to refer back the award to him for reconsideration.

(a) 1 Brod. & Bing. 80.

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Per Curiam.—The award is conclusive, there being nothing on the face of it to warrant the objection. Affidavits cannot be received to shew what particular charges have been allowed.

Rule refused.

Wednesday,
Nov. 9th.

MAVOR, Assignee of WILLIAM HENRY PYNE, a Bankrupt, v. JOHN PYNE.

A debtor to a bankrupt's estate cannot, in an action brought against him by the assignee, set up the statute of limitations as an objection to the petitioning-creditor's debt.

The defendant was a subscriber to a work which was to be published in *twenty-four monthly numbers*. He received eight numbers, and afterwards had notice from the publisher that the others were ready for him if he would send for them. On his refusal to take the remaining sixteen, the plaintiff, the assignee of the publisher, who had become bankrupt, sued

him for the value of the whole. The Jury having found a verdict for the plaintiff, for the price of the eight numbers received by the defendant—the Court refused to disturb it, although it was contended that the contract was entire, and void under the 4th section of the statute of frauds, it not having been reduced into writing, or to be performed within a year.

THIS was an action of *assumpsit* brought by the plaintiff, as assignee of *W. H. Pyne*, a bankrupt, for goods sold by the bankrupt to the defendant. The declaration contained counts on promises by the defendant to the bankrupt before his bankruptcy, and to the plaintiff as his assignee since. The defendant pleaded,—*first*, the general issue;—and *secondly*, that, after the making of the promises in the declaration mentioned, and before the commencement of the suit, and *before W. H. Pyne* became a bankrupt, to wit, on &c., by his certain writing of release, he released and discharged the defendant from all actions, suits, debts, &c. &c.—Replication, that, before the execution of the release *W. H. Pyne* had become and was a bankrupt:—on which issue was joined.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last Term, it appeared that the bankrupt was the author of a work called "*Pyne's History of the Royal Residences*," which was published by subscription, in *twenty-four monthly numbers*, at the price of one guinea each;—that the whole of the numbers were

printed, and left for delivery at the house of the bankrupt, where each subscriber received his number monthly;—that the defendant was a subscriber, and had admitted that he had received eight numbers, but said that he should not pay for them, as the whole had not been sent to him; on which he was informed, that the publisher (the bankrupt) did not undertake to deliver, and that he, the defendant, might have the remaining sixteen numbers if he would send for them. The release appeared to have been executed by the bankrupt, in *April*, 1820, whilst he was in prison, and after he had committed an act of bankruptcy; but it appeared that no commission had issued against him until 1822. The defendant was aware that the bankrupt was insolvent at the time the release was executed. From the evidence offered to support the petitioning-creditor's debt, it appeared that 115*l.* were due from the bankrupt, for goods furnished to him by the petitioning-creditor, the delivery of which commenced in 1812, and was completed in 1818. It was contended for the defendant, —*first*, that the statute of limitations applied to the debt, as it did not appear how much of the 115*l.* was due within six years before the suing out of the commission;—*secondly*, that, as the contract was entire, and could not be split into parts so as to make every number of the work the subject of a separate contract, it was void by the statute of frauds, as it had not been reduced into writing, nor was the work to be completed within a year;—and *lastly*, that the release by the bankrupt to the defendant was valid, and a bar to the plaintiff's right to recover, as it was executed two years before the commission was issued, and consequently fell within the provisions of the statute 46 *Geo.* 3, c. 135. The Jury found a verdict for the plaintiff, damages eight guineas, the price of the numbers received by the defendant, leave being reserved to the latter to move the Court to set it aside; but his Lordship was strongly inclined to

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think that there was no valid foundation for either of the objections.

Mr. Serjeant *Vaughan* now applied for a rule *nisi*, that this verdict might be set aside and a nonsuit entered, or a new trial granted, and, renewing the objections taken at the trial, further submitted that the plaintiff was not in a situation to sue the defendant, as he had not shewn that the bankrupt's contract had been performed by the delivery of the whole of the numbers constituting the work. With respect to the *first* objection, the learned Serjeant submitted, that, as it did not appear that a sufficient petitioning-creditor's debt had been contracted within six years before the commission was sued out, the statute of limitations was available to the defendant, as he could not plead the statute, nor could he know what debt the plaintiff would rely on. A petitioning-creditor's debt, to be valid, must be a debt on which an action might be supported by him against the bankrupt; and any objection to a commission may be taken advantage of in defending an action brought by the assignees:—*Secondly*, as the work was not to be completed within a year, the contract was void by the 4th section of the statute of frauds, the agreement for the contract not having been reduced into writing and signed by the parties to be charged therewith. The contract too was for the entire work, which was to be published at intervals, and would require two years for its completion; and, in *Boydell v. Drummond* (a), where the plaintiff brought an action to recover the price of certain numbers of a work, which the defendant, a subscriber, refused to take; it appearing to have been the understanding of the parties to the contract at the time, that it was not to be completed within a year, although it might be, and

(a) 11 East, 142.

was in fact, in part, performed within that period, it was held to be within the statute, and that, as it was not in writing and signed by the party to be charged, it could not be enforced against him:—*Thirdly*, the release given by the bankrupt to the defendant is a bar to the present action, as it was executed more than two months before the commission was sued out. Besides, it appeared that the commission was not issued until two years after the act of bankruptcy had been committed, and the plaintiff ought, at all events, to have alleged in his replication, that the defendant knew of the act of bankruptcy, or that *Pyne* was insolvent when he executed the release.—At least, it was incumbent on the plaintiff to shew that the bankrupt had performed his contract, by causing the whole of the parts or numbers to be delivered to the defendant; or he should have shewn that the remaining sixteen had been tendered previously to the commencement of the action.

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Lord Chief Justice Bxsr.—I entertain the same opinion now that I formed at the trial. With respect to the objection that it did not appear that 100% of the petitioning-creditor's debt was contracted within six years before the suing out of the commission against the bankrupt *Pyne*, the case of *Quantock v. England* (a) is an express authority to shew, that, if the bankrupt submit to the commission, a third person cannot take advantage of the objection; and although, in the subsequent case of *Fowler v. Brown* (b), Lord *Mansfield* ruled at *Nisi Prius*, that the statute of limitations did not prevent a creditor from taking out a commission of bankrupt, but extended only to the remedies by action mentioned in the statutes, and did not extinguish the debt, or take away any other remedy; yet, in *Ex parte Dewdney* (c), Lord *Eldon* said, that

(a) 5 Burr. 2628.

Edit., Vol. 1, by Roots, 21.

(b) Cooke's Bkpt. Laws, 8th

(c) 15 Ves. 493.

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he could not consider that *dictum* at *Nisi Prius* as an authority overthrowing the unanimous judgment of the Court in *Quantock v. England*, which his Lordship approved of and confirmed. Here, therefore, it is not open to the defendant, a debtor to the bankrupt's estate, to say that the plaintiff cannot recover in his character of assignee, on the ground that the petitioning-creditor's debt was barred by the statute of limitations. The defendant took no interest in the proceedings under the commission. He was bound to pay his debt to the bankrupt's estate, and his remedy, if any, was by petition to the Lord Chancellor; and, even if a Court of equity were inclined to relieve him, a Court of law ought not to lean to objections raised by debtors to a bankrupt's estate against the petitioning-creditor's debt, when the bankrupt himself has not disputed the validity of the commission. If the commission were fraudulently sued out, the Court from which it emanated is empowered to supersede it.—As to the release, as the defendant pleaded that it was executed *before* the bankruptcy, and it was found that it was executed *after* an act of bankruptcy had been committed, the plea was not proved; and, as the defendant himself put an end to the contract by not taking the whole of the numbers, which he was told were ready for him, and as the Jury confined their verdict to the numbers actually received by him, I am of opinion that there is no reason to disturb it.

Mr. Justice PARK and Mr. Justice BURROUGH concurred.

Mr. Justice GASELEE.—The statute of limitations was meant to operate in favour of the debtor, that he might not be harassed for an old debt. But a third party, or a person standing in the situation of the defendant, cannot take advantage of an objection of this nature, the bankrupt him-

self having raised none, but having submitted to the commission. The other points appear to me to have been most satisfactorily answered by my Lord Chief Justice.

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Rule refused (a).

(a) See *Gregory v. Hurrill*, 6 B. Moore, 525, 8 B. Moore, 189, S. C. 5 Barn. & Cress. 341.

DOE, on the several demises of CLARK and Others, v.
SPENCER.

Thursday,
Nov. 10th.

THIS was an action of ejectment. The declaration contained three demises.

At the trial, before Lord Chief Justice *Best*, at *Westminster*, at the Sittings after the last Term, the demise on which the lessor of the plaintiff relied, was by *Henry Dance*, the provisional assignee of the Court for the relief of insolvent debtors; and, it not appearing that any assignment had been made by him to a subsequent assignee appointed by that Court, it was objected, for the defendant, that the provisional assignee could not maintain ejectment; as, by the provisions of the statute 1 Geo. 4, c. 119, the property of the insolvent was only vested in him *pro tempore*, viz. previously to its being transferred to the assignee to be appointed by the Court to act for the insolvent's creditors, who alone was entitled to sue by ejectment. His Lordship, however, was of opinion, that, as the object of the statute was to benefit the creditors, and not to give an advantage to the debtor, the legal estate of the insolvent was vested in the provisional assignee, and remained in him, until the subsequent assignee was appointed by the Court; and that, as it did not appear that any other assignee had accepted

The provisional assignee of the Insolvent Debtors' Court, may maintain ejectment for the estate of an insolvent assigned to him under the provisions of the statutes 1 Geo. 4, c. 119, and 3 Geo. 4, c. 123, without the previous approbation of one of the commissioners, or order of the Insolvent Court.

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the trust, his Lordship thought that this action might be maintained by the provisional assignee; and the Jury accordingly found a verdict for the lessor of the plaintiff.

Mr. Serjeant *Wilde* now applied for a rule *nisi*, that this verdict might be set aside, and a nonsuit entered. He relied on the 7th (a) and 11th (b) sections of the statute 1 Geo. 4, c. 119; by the former of which it is enacted, that the prisoner's estate and effects, which were vested in the provisional assignee, shall be assigned by him to an assignee to be appointed by the Court; and, by the latter, that no suit at law can be proceeded in, further than an arrest on mesne process, by any assignee of the prisoner's estate, without the

(a) By which it is enacted—
“that, when the Court for the relief of insolvent debtors shall adjudge any prisoner to be entitled to his discharge, such Court shall appoint a proper person or proper persons, to be assignee or assignees of the estate and effects of such prisoner, for the purposes of the act; and when such assignee or assignees shall have signified to the said Court their acceptance of the said appointment, every such prisoner's estate, effects, rights, and powers, vested in such provisional assignee as aforesaid (see sect. 4), shall immediately be assigned by such provisional assignee to such assignee or assignees, in trust for the benefit of such assignee or assignees, and the rest of the creditors of every such prisoner, in respect of, or in proportion to, their respective debts, according to the provisions of the act; and such assignee or assignees is and

are hereby fully empowered to sue from time to time as there may be occasion, in his, her, or their own name or names, for the recovery, obtaining, and enforcing, any estate, effects, or rights, of any such prisoner.”

(b) By which it is provided and enacted—“that no suit in law be proceeded in further than an arrest on mesne process, or suit in equity be commenced, by any assignee or assignees of any such prisoner's estate and effects, without the consent of the major part in value of the creditors of such prisoner, who shall meet together, pursuant to a notice to be given at least fourteen days before such meeting, in the *London Gazette*, or other newspaper which shall be published in the neighbourhood of the last residence of such prisoner, for that purpose, and without the approbation of one of the commissioners of the said Court.”

consent of the major part in value of the creditors, and the approbation of one of the commissioners of the Court; whereas it did not appear at the trial, that such consent or approbation had been here obtained: and he submitted, that, although, by the statute 3 Geo. 4, c. 123, s. 2 (a), the provisional assignee is empowered to sue in his own name for the recovery and obtaining the prisoner's estate, yet he can only do so by order of the Court; and, as the provisional assignee did not shew that he had such order, it would be too much for this Court to presume it.

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Lord Chief Justice BEST.—This was an action of ejectment, brought (amongst others) on the demise of the provisional assignee of the Insolvent Debtors' Court; and, at the trial, it was objected for the defendant that the provisional assignee was not in a situation to maintain the action, as he had a mere temporary interest; and that, when the subsequent assignees were appointed by the Court, all the interest of the provisional assignee passed to and became vested in them; but I was of opinion that the legal estate of the insolvent, real as well as personal, was vested in the provisional assignee, and remained in him until a subsequent assignee was duly appointed by the Court. Another objection has now been raised, which was not suggested at *Nisi Prius*, but to which we are bound to yield, if the defendant be in justice entitled to

(a) By which it is enacted—
 “that it shall be lawful for the provisional assignee to sue in his own name, *if the said Court shall so order*, for the recovery, obtaining, and enforcing, of any estate, debts, effects, or rights, of any such prisoner; and, in case of the dismissal of the petition of any such prisoner praying for his discharge,

which the said Court is hereby empowered to dismiss whenever it shall seem fit, all the acts done before such dismissal by the said provisional assignee; or other persons acting under his authority according to the order of the said Court, shall be good and valid.”

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it, *vis.*, that the provisional assignee could not maintain this action without shewing that it was brought with the approbation of one of the commissioners, and the consent of the major part in value of the creditors, or the order of the Insolvent Debtors' Court. But I am of opinion, that, under both the statutes to which we have been referred, there is no foundation for this objection, and that such proof could not have been required at the trial. It is a great and growing evil to encumber causes with unnecessary proof, and frequently gives grounds for animadversion on the administration of the law.—With respect to the first objection raised at the trial, it appears to the Court, as it then did to me, that all the real and personal estate of a prisoner is completely vested in the provisional assignee by the assignment made to him, and so remains, until it is assigned by him to the subsequent or ultimate assignee appointed by the Court, and the latter has accepted such assignment. Does, then, either of the clauses in the statutes referred to, prevent the provisional assignee from exercising his right over the property of the insolvent, without the approbation of one of the commissioners, or an order of the Insolvent Debtors' Court? By the 4th section (a) of the statute 1 Geo. 4, c. 119 (which is most material) all the real and personal estate and effects

(a) By which it is enacted—
“that each prisoner shall, at the time of subscribing his petition, duly execute a conveyance and assignment, in such manner and form as the Court shall direct, of all the estate, right, title, interest, and trust, of such prisoner, to all the real and personal estate and effects of every such prisoner, except the wearing apparel, bedding, and other such necessities, of such prisoner and his fa-

mily, not exceeding in the whole the value of 20*l*, so as to vest all such real and personal estate and effects in the provisional assignee of the said Court, subject to a proviso, that, in case such prisoner shall not obtain his discharge by virtue of this act, such conveyance and assignment shall, from and after the dismissal of the petition of such prisoner praying for his discharge, be null and void to all intents and purposes.”

of the prisoner, at the time of subscribing his petition for his discharge, are completely vested in the provisional assignee, subject to a proviso, that, in case the prisoner shall not obtain his discharge by virtue of the act, the assignment shall be null and void. By that section, until something be done to remove the provisional assignee, the prisoner's estate remains vested in him. The 7th section relates to the appointment of a subsequent assignee or assignees by the Insolvent Court, and directs, that, when such assignees shall have signified to the Court their acceptance of the appointment, the prisoner's estate and effects *vested in such provisional assignee*, shall be immediately assigned by him to such assignee or assignees, in trust, for their benefit and that of the rest of the prisoner's creditors. Under that section, therefore, the estate of the prisoner remains in the provisional assignee after the assignment to him, until he makes an assignment to the assignees appointed by the Court. The 11th section provides that no suit at law shall be proceeded in further than an arrest on mesne process, by any assignee of a prisoner's estate, without the consent of the major part in value of the creditors, and the approbation of one of the commissioners of the Court; and it has been objected, that, although the prisoner's estate be vested in the provisional assignee, yet that it was incumbent on him to prove at the trial that he had previously obtained such consent and approbation. It is, however, quite clear that the clause was not intended to confer a benefit on an assignee or person standing in the character of the plaintiff, but merely to prevent the estate of the insolvent from being wasted in useless and unnecessary litigation. The statute 3 Geo. 4, c. 123 has not enlarged the law, or given any new advantages to insolvents. It has rather a contrary tendency. It recites the previous act of 1 Geo. 4, c. 119: and the 1st section enacts, that "it shall be lawful for the provisional assignee of the Court to take possession

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by himself, or by means of a messenger of the said Court, or other person or persons appointed by him, of all the real and personal estate and effects of every prisoner who shall subscribe his petition and execute such conveyance and assignment as in the recited act mentioned; and that all and every the real or personal estate, money, and effects, vested in, or possessed by, such provisional assignee, by virtue of either of the acts, shall *not remain* in him if he shall resign or *be removed* from his office, or in his heirs, executors, or administrators, in case of his death, but shall in every such case go to and be vested in his successor in office." This, therefore, evidently shews, that, whilst the provisional assignee remains in office, the prisoner's estate is vested in him; he is authorized to take possession of it, either by himself, or by some person to be appointed by him; and his right to such estate is absolute and complete so long as he is assignee. By the 2nd section, it is enacted, that it shall be lawful for the provisional assignee to sue in his own name, *if the Court shall so order*, for the recovery, obtaining, and enforcing, of any estate, debts, &c., of any prisoner; and that all acts done by such assignee before the dismissal of the petition for the prisoner's discharge, shall be good and valid. If that were the only section applicable to this case, the objection might perhaps prevail, as the provisional assignee could not exercise a right to sue in his own name, without the order or direction of the Court; but by the 1st section he was authorized to take possession of all the real and personal estate and effects of every prisoner who should subscribe his petition and execute such assignment as in the recited act mentioned, by which the estate of the prisoner was absolutely vested in him as such assignee, until a subsequent assignment was executed; and by the latter statute it was to remain in him until he resigned or was removed: and here, it did not appear that any assignment

had been made by the provisional to a subsequent assignee, or that the former did not remain in office. The provisional assignee, therefore, is protected by both statutes. The principal objects of the Legislature appear to be, to secure the creditors of an insolvent from a wasteful expenditure of his estate, and to afford protection to the provisional assignee, who is an officer of the Court, from the consequences of any act he might have done by virtue of the assignment of the insolvent's estate to him, in case such assignment has become void by the commissioners' holding that the insolvent was not entitled to his discharge. Such objections as these do not appear to have been ever raised before; but, if an action be brought without a proper authority, this Court might perhaps stay the proceedings on motion, or the Court for the relief of insolvent debtors might order the provisional assignee, as their officer, to discontinue or suspend it. It is, however, sufficient for us to say, that this defendant is not in a situation to avail himself of either of these objections in an action of ejectment brought against him, as the statutes were passed for the protection of creditors, and of the parties to whom, and for whose benefit, the estate and effects of the insolvent are directed to be assigned.

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Rule refused.

1825.

Thursday,
Nov. 10th.

WAISTELL v. ATKINSON.

The defendant pleaded a tender as to part, with a *proferri in curia*; and *non assumpsit* as to the residue; and the plaintiff took the money out of Court. At the trial, the Jury found a verdict for the defendant on the plea of tender, and for the plaintiff on the general issue, damages 1*l.* 19*s.* 6*d.*:—*Held*, that the defendant could not enter a suggestion on the roll, to deprive the plaintiff of his costs, under the *London Court of Requests Act*, 39 & 40 *Geo.* 3, c. 104.

THIS was an action of *assumpsit* for the use and hire of a gig. The defendant pleaded *non assumpsit*, except as to the sum of 5*l.*, and, as to that sum, a tender before action brought, with a *proferri in curia*. The plaintiff, having taken the 5*l.* out of Court, proceeded for the residue; and, at the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last Term, the Jury found a verdict for the defendant on the plea of tender, and for the plaintiff on the general issue—damages 1*l.* 19*s.* 6*d.*

Mr. Serjeant *Spankie* now applied for a rule calling on the plaintiff to shew cause why the defendant should not be at liberty to enter a suggestion on the roll, in order to deprive the plaintiff of his costs, under the statute 39 & 40 *Geo.* 3, c. 104 (*London Court of Requests Act*) on an affidavit which stated, that the defendant, at the time of the commencement of the action, was residing, and seeking a livelihood, and trading and dealing, within the city of *London*. The learned Serjeant submitted that the Court could only look at the record for the purpose of ascertaining what the plaintiff had recovered by the verdict of the Jury. In *Cook v. Johnson* (a), the Court of *Exchequer* decided, that, if the plaintiff recover less than 5*l.*, in an action brought in *London*, where the original debt has been reduced by payments and not by set-off, the defendant may enter a suggestion on the roll, under the above act, in order to deprive the plaintiff of his costs. So, in *Horn v. Hughes* (b), it was held, that, if a debt be reduced, by part payment, below 5*l.*, before action brought, the case is within the statute; and here, although the defendant pleaded

(a) 2 Price, 19.

(b) 8 East, 347.

a tender; yet, as the plaintiff afterwards took the sum tendered out of Court, it must be considered as being equivalent to a payment in part; and the only issue the Jury had to try, was, on the plea of *non assumpsit*, under which they found the ultimate balance due to the plaintiff to be under 40s., the statute giving jurisdiction to the amount of 5*l*. Although, in *Heaward v. Hopkins* (a), it was held, that, if there be a plea of tender as to part, and *non assumpsit* as to the residue, and, the plea of tender being found for the defendant, the balance proved on the *non assumpsit* be under 40s., and that added to the sum tendered exceed 40s., the defendant, though subject to the jurisdiction of the *Middlesex* County Court, was not entitled to double costs, under the 23 *Geo.* 2, c. 33; yet that case was decided on a different statute: and, as the present must be considered as falling within the later decisions, where the original debt has been reduced by a payment in part, the defendant is entitled to enter a suggestion according to the provisions of the statute 39 & 40 *Geo.* 3, c. 104.

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Lord Chief Justice BEST.—The case of *Heaward v. Hopkins* is decisive. The point was there argued by very eminent counsel, and the Court most properly decided, that a Court of Conscience Act does not extend to a case where the debt, being originally above the limited amount, has been reduced under it by means of a tender; or, in other terms, that, where a tender has been pleaded, the defendant cannot be entitled to enter a suggestion on the roll: and for these reasons—that the plaintiff could not know that the defendant would plead a tender, and that a tender is not an extinguishment of a debt. The principle established by that case has never been shaken or impugned, but has been since invariably acted on. In *Cook v.*

(a) 2 Doug. 449.

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Johnson, the plaintiff had received more than one-third of his original demand, and to that extent the debt was extinguished. But there is a wide distinction between an actual payment and a tender; as, where a plaintiff has received a part of his debt, he can only sue for the balance; but, where a tender is pleaded, the defendant recognizes the cause of action, and that it was well brought; and, if the plaintiff refuse to accept the sum tendered, he may adhere to his original demand.

Mr. Justice PARK.—I am of the same opinion. The case of *Heaward v. Hopkins* is an authority expressly in point. Lord *Mansfield* there said: “The tender was not an extinguishment of the debt, and the question is, what appears to have been due at the time of the action brought; for, if that exceed forty shillings, the inferior Court has no jurisdiction:” and here, it is quite clear that the plaintiff’s demand exceeded 5*l.* at the time the action was commenced, the defendant having, by the tender, admitted that sum to be due; and the Jury have found a verdict for the plaintiff *ultra* that sum.

Mr. Justice BURROUGH and Mr. Justice GASELEE concurring—

Rule refused (*a*).

(*a*) See *Jordan v. Strong*, 5 Mau. & Selw. 196, where, the debt being originally under 5*l.*, it was held, that the defendant was entitled

to enter a suggestion under the above act, although he had pleaded a tender.

1825.

Saturday,
Nov. 12th.

CHOLMELEY, Esq. v. Sir W. PAXTON, Knt., and two Others.

THIS was a writ of *formedon*. The substance of the pleadings, as stated by Lord Chief Justice *Best*, in delivering the judgment of the Court, was as follows:—The demandant, in his count, set out so much of the will of Sir *Henry Englefield*, Bart., as shewed that an estate was devised by him, subject to a term of years, to the Right Honourable *Charles Sloane* Lord *Cadogan*, and Sir *Charles Bucke*, Bart., and their heirs, in trust for the eldest son of Sir *Henry Englefield*, for life, without impeachment of waste; remainder to the trustees to preserve contingent remainders; remainder to the first and other sons of the eldest son, in tail-male; remainder to the second son, for life, without impeachment of waste; remainder to the trustees to preserve contingent remainders; remainder to the first and other sons of the second son, in succession, in tail-male; remainder to the demandant's mother, for life, without impeachment of waste; remainder to the trustees to preserve contingent remainders; remainder to her (the demandant's mother's) first and other sons, in succession, in tail-male. The count then stated the death of the testator and his wife (for whose benefit the term was created, which, by her death, was determined), the death of the testator's two sons without issue, the death of the demandant's mother, and that the demandant was her eldest son, in which right he claimed the estate.

The tenants, in their eighth plea, on which the question chiefly arose, stated, that the trustees, or the survivor of them, were empowered by the will, at the request, and by the direction and appointment, of any person in possession as tenant for life, to sell the estate for such price as they should think reasonable; and, for the purpose of such sale, to revoke the uses expressed in the will, and to declare other uses, and to lay out the

An estate was devised to trustees (subject to a term of years), in trust for the eldest son of Sir *H. E.*, for life, without impeachment of waste, remainders over, with power to the trustees to revoke the uses in the will, and to declare other uses, and, at the request and by the direction and appointment of any person in possession as tenant for life, to sell, and to lay out the proceeds of such sale in the purchase of other lands, which they were to hold to the same uses. The surviving trustee, at the request of Sir *H. C. E.*, the first tenant for life, in pursuance of the power, sold the estate, *exclusive of the timber growing on it*, and Sir *H. C. E.* sold the timber; both being conveyed to the purchaser by the same deed:—
Held, that Sir *H. C. E.*, the tenant for life, having but a qualified interest in the timber, the surviving trustee, in conveying the estate *exclusive of the timber*, had not well executed the power.

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proceeds of the sale in the purchase of other lands, which they were to hold to the same uses as the lands devised, and to receive and give a discharge for the purchase-money, which they were to lay out in real or government securities until a proper estate could be purchased, and, in the mean time, to pay the interest and dividends to the tenant for life. The plea then stated, that, in pursuance of this power, Lord *Cadogan*, after the decease of Sir *Charles Bucke*, at the request of Sir *Henry Charles Englefield*, the first tenant for life, sold the estate to *William Byam Martin*, for 13,400*l.*, a sum which Lord *Cadogan* judged to be a reasonable price for the same; and it then set out so much of the deed to *W. B. Martin* as revoked the former uses of the will, and conveyed the estate to *M. Yorke*, in trust for *W. B. Martin*, in fee, for the price of 13,400*l.* The plea then deduced the title from *W. B. Martin* and his trustee to the tenants. *Profert* was made of the deed of conveyance from Lord *Cadogan* to *W. B. Martin*.

The demandant, in his replication, demanded oyer of that deed. The deed was then set out, from which it appeared, that Lord *Cadogan* sold the estate, *exclusive of the timber growing upon it*, for 13,400*l.*, and that the timber was sold by Sir *H. C. Englefield* to *W. B. Martin* for 2,448*l.*, which timber Sir *H. C. Englefield*, by the same deed, conveyed to *W. B. Martin* and his heirs, and the receipt of which 2,448*l.* Sir *H. C. Englefield* acknowledged in the body of the deed, and also by a receipt on the back thereof. The replication also stated the will of Sir *Henry Englefield*, and shewed from that will that the power was what it was stated to be in the eighth plea, and brought under the view of the Court the supposed imperfections in the execution of the power, by the surviving trustee selling only the land, and allowing the tenant for life to sell the timber upon it, and to receive the price thereof.

To this replication the tenants demurred generally, and the demandant joined in demurrer.

The case came on for argument in the last Term.

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Mr. Serjeant *Peake*, for the tenants, and in support of the demurrer, submitted, that the question raised on the face of the pleadings, was, whether the deed set out on oyer in the replication was a good execution of the power of sale contained in the will of Sir *Henry C. Englefield*, or whether Lord *Cadogan*, the surviving trustee, having sold the estate to *Martin*, exclusively of the timber then growing upon it, had executed the power so as to make a legal conveyance of the estate to *Martin*. As Sir *H. C. Englefield*, the tenant for life, had an estate without impeachment of waste, he had a right to cut and sell all the timber which, whilst standing, formed part of his estate. The land could not have been sold without his request or consent. He had a right to sell and receive the value of the timber instead of cutting it down, as the estate would fetch a far better price with than without the timber standing upon it.—At all events, as the trustees had a power to revoke the uses in the will, the conveyance by Lord *Cadogan*, the surviving trustee, operated as a revocation of such uses, and is of itself a bar to the demandant's claim. The object of the power was, not only to enable the trustees to sell or exchange the estate, but to revoke the uses expressed in the will, and to declare other uses. This case is distinguishable from that of *Doe d. Willis v. Martin* (a), as there the Court considered that the revocation of the uses, and conveyance of the property, although effected by different instruments, constituted but one act. There, too, the power of revocation was merely conditional, and the case was decided principally on the ground of fraud, and the infancy of the trustee. Here, however, the power of sale by the trustees was absolute, as their receipt was to be a discharge

(a) 4 Term Rep. 39.

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to the purchaser. The only distinction is, that they could not sell without the consent of the tenant for life. In the case of the Countess of *Plymouth* v. Lady *Archer* (a), where there was a devise of lands to be sold, and other lands to be purchased in another county, and *A.* was to be tenant for life (without impeachment of waste) of the lands to be purchased, and the rents and profits of the lands to be sold were to be to the same uses—it was held, that *A.* could not cut down timber on the lands to be sold; but the reason assigned by Lord *Thurlow* was, that, if he could cut the timber on the estate to be sold, and likewise on that to be bought, he would have double waste. In *Burges* v. *Lamb*, Lord *Eldon* said (b), “I must attend to the legal and equitable rights of a tenant for life unimpeachable for waste, who is at liberty to cut timber, generally, treating it in a husband-like manner, independent of the effect upon the beauty of the place, provided the exercise of that liberty cannot be checked by a due application of the principles upon which, in the contemplation of a Court of Equity, that is waste which is not acknowledged as such at law.” In *Wolf* v. *Hill* (c), estates were settled on trustees and their heirs, during the joint lives of *W. H.* and his wife, without impeachment of waste, upon trust, out of the rents and profits, to pay all expenses and out-goings, and to raise and pay a sum by way of pin-money to the wife, and, subject thereto, to pay the clear residue of the rents, &c., to *W. H.*, during the lives of himself and his wife; remainder to *W. H.*, for life, without impeachment of waste; remainder over: with power for the trustees to sell and lay out the produce in the purchase of other lands to the same uses. The estate being sold under the power, *W. H.* was held entitled to the produce of timber cut down by him previously to the

(a) 1 Brown's Chan. Cas. 159.

(b) 16 Ves. 185.

(c) 2 Swanst. 149, n.

sale. So, here, if the tenant for life might cut down the timber on the estate before the sale, he had a right to sell or convey it with the land, as it formed a part of the estate, to which he was clearly entitled.

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Mr. Serjeant *Cross*, *contra*.—As there is no decision which bears directly on this question, it must be decided on general principles. The clear and manifest intention of the testator was, that the estate devised should be sold by the trustees, and another estate purchased in lieu thereof. The sole object of the power was, that the trustees might exchange one estate for another. The cases of *Goodtitle d. Clarges v. Funucan* (a), and *Pomery v. Partington* (b), have established the principle, that the intention of the parties creating powers must govern the Courts in their construction of them; and here, the testator did not mean that the trustees should sell the estate devised, without purchasing another with the proceeds of that sold. But the power has not been executed in form or in substance by Lord *Cadogan*, the surviving trustee. The timber growing on the land at the time of the conveyance to *Martin*, formed an integral part of the estate, and, if it had been stripped of it, its value would have been considerably diminished; but a tenant for life without impeachment of waste, is not the owner of timber growing on the estate, nor has he such an interest in it as to be capable of conveying it to another. He has only a liberty to cut it. The timber belongs to the person entitled to the inheritance; and, although an action of waste does not lie where there is an intermediate estate, yet *Bowles's* case (c) has clearly established that a tenant for life has but a special interest in trees growing on the land. A Court of Equity will restrain a tenant for life

(a) 2 Doug. 572.

(b) 3 Term Rep. 675.

(c) 11 Rep. 81 b.


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from cutting down timber which is ornamental or useful for shade or shelter. The case of *Wolf v. Hill* merely goes to shew that a tenant for life without impeachment of waste is entitled to the produce of such timber only as is cut down by him previously to the sale of the estate, and not to the value of the trees then standing; and here, as the trustee only conveyed the land, exclusively of the timber then growing upon it, it was not a valid execution of the power. The timber might, by possibility, be worth even more than the land on which it stood; and in *Bridges v. Stephens* (a), where a party was entitled to a life-interest in a term of years, without impeachment of waste, on a motion for an injunction to restrain him from cutting timber—it was held, that, as between him and the remainder-man, he might cut down timber and apply it to his own benefit; yet, the Lord Chancellor referred it to the Master to inquire what timber was fit and proper to be felled in the course of a due and husband-like management of the woods: his Lordship having previously declared that the tenant was only entitled to apply to his own profit, such timber as was fit to be cut in the course of such management. That case, therefore, is an express authority to shew that the tenant for life could not even cut down timber that was not for his own benefit, or fit for cutting; and, as the land only was conveyed by the trustee, the power was not well executed.

Mr. Serjeant *Peake*, in reply.—It has not been disputed, that a tenant for life without impeachment of waste, has a right to cut timber growing on his estate. He may, at all events, cut all that is become timber, or is in a fit state for cutting; *à fortiori*, it follows, that, when he consents to a sale, he has a right to dispose of the timber instead of cutting it down. Besides, the estate and tim-

(a) 2 Swanst. 150, n.

ber were conveyed by one and the same deed, to which the trustee was a party. The tenant for life would not have assented to the sale, unless he had received an equivalent for the timber; and, instead of deteriorating the estate by cutting it down, he conveyed it to the purchaser for its fair value, and the trustee sold the estate for an aggregate sum, *minus* the value of the timber, which clearly belonged to the tenant for life.

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Cur. adv. vult.

Lord Chief Justice BEST, after stating the abstract of the pleadings, as set out at the commencement of the case (a), delivered the judgment of the Court as follows:—

From the deed set out on oyer in the replication, it appears that Lord *Cadogan*, the surviving trustee, had nothing to do with the sale of the timber, and that he formed no opinion as to the reasonableness of the price paid for it, nor ever received, or had any control over it. Although it was conveyed as real property to the heirs of the purchaser, the trustee did not join in that conveyance: he did not convey the woods, but only the land on which those woods stood. This is at least the legal effect of the deed; for, although a conveyance of the land would convey the timber, if there were nothing to contract the effect of such conveyance, yet here it is contracted by the conveyance of the woods in the same deed. It seems to have been supposed that Sir *Henry Charles Englefield* was not impeachable of waste. The woods, whilst standing and forming a part of the estate, were his property; and he is by the deed the only party who conveys the woods. The question, then, is, whether Lord *Cadogan*, having sold and conveyed the estate without the timber standing on it, has executed the power so as to convey the estate, or any part of it, or any interest in it. A tenant who is not impeachable

(a) *Ante*, pp. 17, 18.

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of waste, may cut down all the timber on the estate; and, the moment it is severed from the ground, he may convert it to his own use. But a tenant without impeachment of waste, has no interest in the woods whilst standing; nor can he convey any interest in them to another. A tenant in tail is unimpeachable of waste; but, if standing woods are sold by him, and they are not cut down during his life, the property in them descends with the estate; and the vendee cannot cut them. A tenant in tail, or other tenant unimpeachable of waste, may give an authority to cut down timber; but such authority conveys no interest, and is revoked by the death of the party by whom it is given. It may be asked, if a tenant unimpeachable of waste might cut down every tree on the estate, as the estate will sell better with the trees uncut than when it is quite denuded of timber, is it not for the advantage of the reversioner that the tenant for life should give up his right of cutting the timber, and be permitted to sell it with the estate? Whether this would be for the advantage of the reversioner or not, must depend upon many circumstances; for instance, the quantity of timber, and the means which the tenant for life may have for cutting it. He may die before he can cut the whole, or a considerable part, or even a single tree. Although a tenant in tail may bar remainders, by a recovery, yet the Court of *Chancery* will not allow a trustee, who has lands in trust for one and the heirs of his body, with remainder over, to convey to such person in fee; because such a conveyance would prevent the reversioner from claiming the estate if the tenant in tail should die before he had suffered a recovery. This was settled in a case to be found in *Equity Cases Abridged* (a). It is not fit, therefore, that a tenant for life, or trustees, should be permitted to do that which may injure or prejudice the reversioner.

(a) Vol. 1, p. 395.

Besides, in the sale of growing timber, trees of the value of one shilling are included; and, although a tenant unimpeachable of waste would not perhaps be liable to an action for cutting down small trees, a Court of Equity would prevent him from taking such as were not ripe or fit for cutting. The tenant unimpeachable of waste, therefore, by selling the timber standing, gets an advantage over the reversioner which he otherwise could not be permitted to obtain (*a*). Here it does not appear that any of the timber was felled during the life of Sir *H. C. Englefield*. It was a part of the estate at the time of the sale, and may be so at this moment. This part of the estate has not been conveyed by the trustees, or by any other person that had authority to convey it. Is, then, the sale of an undivided part of the estate (for the trees, whilst standing, are a part) a good execution of the power as to the part sold. The power of sale in the will is in these words: "To make sale or dispose of, or to convey in exchange of or for any other manors, all or any part or parts of the manors, messuages, and tenements aforesaid, with the appurtenances, to any person or persons whomsoever, either together or in parcels, for such price or prices in money, or any other equivalent, as to them, the trustees, should seem reasonable." The trustees must substantially comply with the authority given to them. If they do not, the act done by them will not be a good execution of the power; and the conveyance will be altogether void. They might sell different parts or parcels of the estate at different times and at different prices, and make separate conveyances of each parcel so sold; but that is the extent of their authority. They cannot sell *part* of a parcel. They must not sell the land without the timber, or the timber without the land on which it grows. The sale of the one without the other would be a cause of confusion and litigation, which could

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(*a*) See 2 Brown's Parl. Cas. 88.

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not fail to be injurious both to the vendor and vendee; and such a sale is a material departure from the power, and injurious to the reversioner, and therefore altogether void. When a tenant for life requires an estate to be sold under such a power as this, he places himself in the situation of the owner of an estate decreed to be sold by the Court of *Chancery*; and he must, like him, sell it with the timber. This was decided in *Burges v. Lamb* (a). As the estate to be purchased with the proceeds of the sale must be conveyed to the same uses as the old estate, the tenant for life may have a right to cut down the timber on the purchased estate, and that is a just equivalent for his not cutting the timber on the first estate. It was not attempted, in the argument at the bar, to insist, that, although the timber was not conveyed, the mere conveyance of the land on which such timber was standing would include it, or could be supported; we presume that such an argument was considered untenable. My brother *Peake* seemed to feel that the sale was not warranted by the power; and he argued, that, although the sale might not be good, yet that, the trustees having a power to revoke the uses in the will, and the surviving trustee having revoked them, the demandant had no title to support this writ of *formedon*. But the trustees were only to revoke the uses for the purpose of a sale or exchange, that is, for the purpose of such a sale or exchange as is consistent with the power. The legal estate is in the *cestui que use*, and nothing remained in the trustees but a conditional power. The will authorizes the trustees to sell on the request of the tenant for life in possession, and then it says, “and to that end (that is, that they make a sale) they may revoke and make void the uses on which this estate is devised to them.” If they had revoked the uses by one deed, and had conveyed the estate by another, the two deeds would have

(b) 16 Ves. 174.

been considered as parts of the same transaction; and, if the conveyance had been void, the revocation of the uses, preparatory to the conveyance, would have been void also. Although the case of *Doe d. Willis v. Martin* (a), which was referred to by my brother *Peake*, is in many of its circumstances distinguishable from the present; yet all the Judges who decided that case laid down principles which must govern this; for there, Lord *Kenyon* said (b), "I am most clearly of opinion, taking the whole of the power together, the deed was no legal revocation; they (that is the *cestui que use*) had only a power to revoke on condition;" Mr. Justice *Ashurst* said (c), "Their interest could only be divested by a due execution of the power of revocation; a *bad execution* has no operation whatever;" Mr. Justice *Butler* said (d), "The power of revocation was conditional; but, that condition not having been complied with, the deed of revocation is void:" and Mr. Justice *Grose* said (e), "This was merely a conditional power, which must be considered altogether; and no part of the execution can be good, unless the whole is good." It is true, that, in that case, the trustee who made the conveyance was an infant, and it was thought that the case was not within the statute 7 *Anno*, c. 19, which gives validity in certain cases to the conveyances of infant trustees; but that was not the reason given by any one Judge for his opinion. They all rested their judgment on this, that, although the revocation of the uses, and the subsequent conveyance of the property, were by different instruments, yet all the acts done were in execution of the power; and that, not being well executed, every deed made for the purpose of executing that power was void. In this case, the revocation of the uses, and the conveyance or sale of the estate, were done at the same time, and by the same

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(a) 4 Term Rep. 39.

(b) Id. 66.

(c) Id. 68.

(d) Id. 68.

(e) Id. 70.

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deed. The remainder under the will, which vested in the demandant, could only be divested by a legal revocation of the uses by the trustees; and, as there was no good or valid revocation of the uses, the demandant's estate remained undisturbed, and the surviving trustee had no legal interest to convey. We are, therefore, of opinion, that the eighth plea is not supported by the deed set out on the record on oyer, and that the demandant is entitled to judgment on the demurrer to the replication to that plea.

Judgment for the Demandant.

Saturday,
Nov. 12th.

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An annuity-deed need not be executed by all the parties to it, before the enrolment of the memorial pursuant to the statute 53 Geo. 3, c. 141, s. 2. Therefore, a memorial enrolled within thirty days after the execution of the deed by the grantee, is sufficient, although the deed be not then executed by the grantor.

If the names of all the witnesses to the deed are inserted in the memorial, it is sufficient, without specifying the parties by whom the deed was executed in their presence.

THIS was an action of *covenant* on an annuity-deed. The declaration stated, that, on the 2d November, 1821, by a certain indenture made between one *Richard Buckeridge* of the first part; *George Buckeridge*, the defendant, of the second part; *Banister Flight*, the plaintiff, of the third part; *Alexander Wylie*, *Edward Greenhill*, and *William Roberts James*, of the fourth part; the said *Alexander Wylie* and *Catherine*, his wife, and *Alexander Forrest*, of the fifth part; and *Thomas Flight* of the sixth part; the said *Richard Buckeridge*, for the consideration therein mentioned, granted an annuity of 400*l.* to the plaintiff, for the life of him, the said *Richard Buckeridge*; and that the defendant covenanted for the due payment of the annuity to the plaintiff, and assigned for breach, that two years were in arrear and unpaid.

The defendant pleaded several pleas—on the three first, issues were joined. The fourth stated, that, although the plaintiff within thirty days after the execution of the indenture in the declaration mentioned, by the said *Richard Buckeridge*, by the said *Banister Flight*, the plaintiff, by the said *Alexander Wylie*, by the said *Edward Greenhill*, by the said *William Roberts James*, by the said *Catherine Wylie*,

by the said *Alexander Forrest*, and by the said *Thomas Flight*, caused a memorial thereof, and of certain other instruments and assurances for granting and securing the said annuity, to be enrolled in the High Court of *Chancery* as follows, that is to say:—"A memorial to be enrolled in his Majesty's High Court of *Chancery*, pursuant to an act of Parliament made and passed in the 53d year of the reign of his late Majesty King *George the Third* intituled, &c. (here the title of the act was set out). Date of instrument—2d *November*, 1821; nature of instrument—indenture of grant and demise; names of parties—between the Reverend *Richard Buckeridge*, of &c., clerk, of the first part, the Reverend *George Buckeridge*, of &c., clerk, (here the names, descriptions, and residences of the parties to the deed were set out at length); names of witnesses, and description—*Daniel Collins*, 28, *Cursitor-Street*, *Chancery Lane*, and *William Wadley*, clerk to Mr. *Wilmot*, No. 1, *Tanfield Court*, *Temple*; name or names of person or persons by whom the annuity or rent-charge to be beneficially received—*Banister Flight*; person or persons for whose life or lives the annuity or rent-charge is granted—for the term of one hundred years thenceforth, if the said *Richard Buckeridge* shall so long live; consideration, and how paid—1999*l.*, in notes of the Governor and Company of the Bank of *England*, and cash; amount of annuity or rent-charge—400*l.* a year." And that, although such memorial of such annuity was enrolled in his Majesty's High Court of *Chancery*, at six o'clock in the afternoon of the 1st day of *December*, 1821; yet the defendant in fact said, that he did not execute the said indenture in the said declaration and memorial mentioned, until long after the enrolment of the above-mentioned memorial, to wit, until three months after such enrolment, to wit, on the 30th *March*, 1822. And the defendant further said, that no memorial whatsoever of the said indenture in the declaration mentioned, was enrolled in the High Court of *Chancery* within thirty days after

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the execution of the said indenture by the defendant, according to the directions of the said act of Parliament made and passed in the 53d year &c., whereby the said indenture in the declaration mentioned was null and void as against the defendant; and this &c., wherefore &c. The defendant, in his fifth plea, alleged, that, although the plaintiff, within thirty days after the execution of the indenture in the declaration mentioned, caused a memorial thereof, and of certain other instruments and assurances for granting and securing the said annuity, to be enrolled in the High Court of *Chancery*, as follows: "A memorial to be enrolled &c. [here the memorial was again set out as in the fourth plea]; yet the defendant in fact said, that he did not execute the said indenture in the memorial and declaration mentioned, in the presence of the said *Daniel Collins* and *William Wadley*, as in the said last-mentioned memorial is mentioned, either at the time the said indenture bears date, or at any time before or since the enrolment thereof, whereby, and according to the said act of Parliament made and passed in the 53d year &c., the said indenture in the declaration mentioned was null and void as against the defendant; and this &c., wherefore &c.

The plaintiff replied to the fourth plea, as follows: —Because, protesting that that plea was wholly bad and insufficient in law, nevertheless, by way of replication thereto, the plaintiff said, that a memorial of the indenture in the declaration mentioned, was, within thirty days after the execution thereof, to wit, on the 1st *December*, 1821, duly enrolled in the High Court of *Chancery*, in pursuance of the statute in such case made and provided, which said memorial is as follows: [here the memorial was again set out *verbatim*, with a *prout patet*]. The plaintiff then alleged that the said memorial did and does duly contain the date of the said indenture, the names of all the parties, and of all the witnesses thereto, and of the person for whose life such an-

nuity was granted, and of the person by whom the same was to be beneficially received, and the pecuniary consideration for the granting of the same, and the annual sum to be paid, in manner and form as in and by the statute in that case made and provided is required; and this &c., wherefore &c.

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The plaintiff demurred specially to the fifth plea, and assigned for causes, that the averment in that plea, that the defendant did not execute the indenture in the presence of the said *Daniel Collins* and the said *William Wadley*, and the issue tendered thereby, were wholly immaterial and irrelevant to the matter in dispute between the plaintiff and the defendant; and that it did not appear nor was it stated in the said plea, that the memorial in that plea mentioned did not contain the names of all the witnesses to the said indenture; and that it was not alleged that no other memorial of the said indenture was enrolled in the High Court of *Chancery*, or that the memorial set forth in that plea was the memorial of the said indenture at present remaining enrolled in the said High Court of *Chancery*, or that no alteration or correction was made in the said memorial set forth in the said plea, after the same was so enrolled, as is in such plea mentioned, and within thirty days after the execution of such indenture; and that the said plea was, at most, an argumentative attempt to deny that any such memorial of the said indenture as was required by the statute, was enrolled in the High Court of *Chancery* within thirty days after the execution thereof; and that the said plea was wholly bad and insufficient in law, for and on account of divers other defects and imperfections therein, as well formal as substantial, but which were far too numerous to be there specifically set forth or further particularized.

The defendant joined in demurrer,—and rejoined to the replication to the fourth plea, that he, the defendant, did not execute the indenture in the declaration mentioned,

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until long after the enrolment of the above-mentioned memorial, to wit, on the 30th *March*, 1822.

Surrejoinder, by the plaintiff,—That, during the whole of the said thirty days next after the execution of the said indenture by the defendant, as in the rejoinder to the replication to the fourth plea mentioned, the said memorial mentioned and described in the said replication to the said fourth plea, was and remained, and continually thenceforth hitherto hath been and remained, and still is and remains, enrolled in the High Court of *Chancery*, as by the said memorial now being and remaining so enrolled in the same Court fully appears.

To this surrejoinder the defendant demurred specially, and assigned for causes, that the plaintiff had not in or by his surrejoinder confessed, or traversed, or denied, the said rejoinder of the defendant, but had tendered an issue upon a collateral, unimportant, and immaterial point; and that the plaintiff had not concluded his surrejoinder by putting himself upon the country.

The plaintiff joined in demurrer.

The cause came on for argument on a former day in this Term.

Mr. Serjeant *Lawes*, for the plaintiff.—Two questions are raised by the pleadings,—*first*, whether the averment by the defendant in his fifth plea, that he did not execute the annuity-deed in the presence of the two witnesses named in the memorial, was immaterial;—and *secondly*, whether the memorial was void, it having been enrolled before the deed was executed by the defendant. It was perfectly immaterial whether the witnesses whose names were set out in the memorial were present at the time of the execution of the indenture by the defendant or not. The statute merely requires that the memorial should state the deed by which the annuity is secured, and the witnesses thereto; and it is sufficient to insert the names of the witnesses, without speci-

fyng whose signatures or execution they attested. There is no averment on the record, that the witnesses whose names are stated in the memorial were not the witnesses who attested the execution of the deed, or that any others were present at the time; nor is it alleged that the defendant executed the deed in the presence of any witnesses; and, if he did not, the memorial is sufficient; and the Court will assume that the persons described therein were the only witnesses to the execution of the deed. It was not necessary that they should see the defendant execute; and, if they attested the execution by the grantor and grantee, the memorial, as set out on the face of the record, is sufficient, and cannot be impeached. In *Parke v. Mears* (a), a bond having been executed by A., and attested by one witness, was carried into an adjoining room and shewn to B., who was desired to attest it also, which he accordingly did in the presence of A.; and the Court thinking that the whole might be considered as one transaction, held that there was sufficient proof of the execution. In *Powell v. Blackett* (b), the obligor of a bond acknowledged to the subscribing witness that he had executed it; and Lord Kenyon ruled it to be sufficient proof of the execution. In *Grellier v. Neale* (c) it was decided, that, if the defendant's hand-writing to a deed be proved, the Jury may presume the sealing and delivery; and Lord Kenyon there said, "The subscribing witness not having seen the deed executed, it is the same as if there were no witness at all; and, in that case, the hand-writing may be proved by another witness."—*Secondly*, as the plaintiff, in his replication to the fourth plea, alleged that the memorial was duly enrolled, and set it out in terms, and in his surrejoinder stated that

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(a) 2 Bos. & Pul. 217.

(b) 1 Esp. N. P. C. 97.

(c) Peake's N. P. C. 147; 3d Edit. 198.

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it still remained so enrolled, and, as it contained all that is required by the statute, it is sufficient. The only object of the Legislature was, that the memorial should contain a true description of the parties to the instrument by which the annuity was secured, and the consideration on which it was granted; and not a memorial of the whole of the transaction. If there are several parties, it seldom happens that all execute the deed on the same day. So, if some of the parties to the deed were resident abroad, it would be impracticable to get the memorial enrolled within thirty days after the execution by those parties; and the statute does not authorize the enrolment of several memorials. When, therefore, the indenture in question was executed by the grantor and grantee, the memorial was duly enrolled within the time required by the statute, and the transaction considered as completed. The defendant might have been a mere trustee; and it was immaterial when he executed the deed. But, as it appears by his rejoinder that he did execute the deed after the enrolment of the memorial, and, as his name was inserted in it as one of the parties, he is liable on his covenant as surety for the grantor.

Mr. Serjeant *Taddy*, *contrd.*.—The defendant, being a mere surety, is at all events entitled to the favour and indulgence of the Court. The statute requires that the memorial should state the names of all the parties and of all the witnesses to the deed, as well as the nature of the instrument by which the annuity is secured, and the consideration for granting the annuity. The witnesses, must mean those persons who attested the deed, and saw it duly executed by the contracting parties in their presence. The object of the Legislature was two-fold, *viz.* to prevent secrecy in the granting of annuities, and to avoid fraud; and, if it should be held sufficient for the grantee to execute the deed, and get it enrolled before its

execution by the grantor, or others of the contracting parties, the whole of the transaction might be surreptitious, and the publicity intended to be given to it by the Legislature altogether defeated.—A memorial of the date of the deed must mean that the memorial shall be enrolled within thirty days after the final execution or delivery of the deed by all the parties, or, at all events, by the parties to be charged thereby; and a memorial enrolled before such execution, cannot give a true and accurate account of a transaction which is not then complete. It in terms implies a record of all that has passed; and the date of the deed is the delivery after it has been finally executed by all the parties. In *Cromwell v. Gruusden* (a), the Court held, that the real date of a bond is the delivery; and in *Dodson v. Kayes*, it is said (b) that “the party must answer to the deed, and not to the date.” So, here, the defendant could not be answerable till he had executed the deed; and, if it were executed by the several parties on different days, it should have been so stated in the memorial. Although it has been said, that, if either of the parties to the deed resided in a foreign country, it could not be enrolled, after the execution by them, within the time prescribed by the act, yet the difficulty might be obviated by enrolling a second memorial. At all events, the defendant could not be bound by the deed until he had executed it; and, if the present objections are not tenable, the consequence will be, that it will not be necessary for the contracting parties to an annuity-deed to execute it in the presence of any witnesses. The main objection is, that the memorial ought to contain a true and accurate description of all the parties to the deed, at the time of the enrolment, which cannot apply to the execution by a party sought to be charged under the deed, who did not execute it until after the enrolment.

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(a) 2 Salk. 463.

(b) Yelv. 194.

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Lord Chief Justice BEST, after stating the substance of the pleadings, now delivered the judgment of the Court as follows:—

This case embraces two questions, which arise on the *fourth* and *fifth* pleas;—*first*, whether the memorial of the indenture by which the annuity in question was secured, having been enrolled within thirty days after the execution of the deed by the grantee and other parties, but before the defendant, who is surety for the payment of the annuity, had executed it, is a good and sufficient memorial within the terms of the stat. 53 Geo. 3, c. 141, s. 2;—*secondly*, whether it is sufficient for the grantee to set forth the names and descriptions of the attesting witnesses to the deed in the memorial, without shewing that the deed was executed by all the parties to it in the presence of such witnesses. With respect to the latter question, we are all of opinion that there is no foundation for the objection. This point has been raised by demurrer to the *fifth* plea. If it appeared by that plea, or on the face of the record, that there were any other witnesses than those whose names and descriptions are set forth in the memorial, or that the defendant executed the deed in the presence of any other witnesses than the two named in the memorial, it would be a different question, as the memorial would not then contain the names of *all* the witnesses, as required by the statute. The plea should have gone on to state, that there were other witnesses than those mentioned in the memorial, before whom the defendant executed the deed. But, as two are sufficiently named and properly described in the memorial, they might have attested the execution of the deed by the defendant or not. If they did, it is sufficient; if not, it is immaterial, as the statute does not require that there should be any attesting witness; but only, that, if there be any, their names and descriptions must appear on the face of the memorial. Here this has been done; and, as no other witnesses were

described therein, it is probable that the defendant's execution of the deed was not attested by any witness; and, as none was necessary, it appears to us, that the memorial was sufficient in this respect. Besides, if the grantor of an annuity resided abroad, and the grantee lived in this country, the deeds could not be returned here to be enrolled within thirty days from the time of their execution by the former; nor could the names of the witnesses in whose presence he executed the deed, be ascertained before the expiration of that period. It is, therefore, difficult to say how the statute can apply to a case of that description, unless the deeds were enrolled before they were sent abroad, with a request to the party who was to execute them there, to have no attesting witness.—The other question, however, raises a point of great importance; and on that alone the Court has entertained a doubt, *viz.* whether the enrolment of the memorial of the deed before its execution by the defendant, is a compliance with the terms of the statute 53 *Geo.* 3, or whether that act requires that the enrolment should not be made until *after* the deed has been executed by *all* the contracting parties. The words of the 2nd section of the statute, are—"that, within thirty days after the execution of every deed or other assurance whereby any annuity shall be granted, a memorial of every such deed, &c., shall be enrolled in the High Court of *Chancery*; and that, otherwise, it shall be null and void." We are not bound by the words or strict letter of the statute, but must construe it according to the intention of the Legislature, and consider the spirit of the act. We think, that all that the Legislature required was, that the enrolment of deeds should not be delayed beyond thirty days from the time of their execution. But there is no reason why the deeds should not be enrolled before they are executed by all the parties; for, by reference to the memorial, it may be seen which of the parties had executed the deeds, as well as the consideration for the annuity, and the

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sum to be secured. A person whose name is set out in the memorial, being a party from that moment, he has equally the means of examining the deeds, whether enrolled before the execution or not. It is equally an accurate history of the transaction. It, therefore, appears to us to be immaterial whether the memorial be enrolled before the deeds are executed, or after; for, it only takes effect from the time of execution; and when one party has executed, it is natural for him to anticipate that the others will execute also: and, if they do so, the instruments are binding on them from the time of execution. If the memorial contain a faithful and accurate account of the transaction, it is all that the Legislature required; and that appears to have been done in this case. The indenture was not only executed by the grantee, but also by the grantor, and the memorial was enrolled within thirty days after such execution. If it had not been, the grantee would have lost his security. If he had been obliged to wait until the last party had executed, the others might, from want of the enrolment, have been discharged. It is true, that, before the execution of a deed, a covenantor is not a party; but, when he has done something to assent to it, he may be considered as a party; and when he executes the deed, he ratifies such assent. The statute was intended to protect annuitants, and not to defeat their just claims; and it relieves them from difficulties under which they were placed by the former statute of the 17 *Geo. 3*, c. 26. It may be said, however, that in this case the deed was not complete until *all* the parties had executed it. But, although the defendant might not have assented to it at the time the memorial was enrolled, yet, as he afterwards executed the deed, he made it a complete and valid instrument. In many cases, the law gives validity to previous acts. A writ of error may be obtained before judgment, and it only takes effect from the time of entering up the judgment. So, here, although the memorial was enrolled before the defendant

executed the indenture, his execution of it afterwards made the enrolment valid. Immediately on his executing he became a party to the deed; and, as it was enrolled within thirty days from the time of its execution by the grantor and grantee, it fell within the provisions of the statute. In thus deciding, it appears to us that we shall carry into effect the intention of the Legislature; and we are, therefore, of opinion, that neither of these objections can prevail, and consequently that there must be —

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Judgment for the plaintiff (a).

(a) The defendant afterwards brought a writ of error, and the Court of *King's Bench* affirmed the judgment of this Court. See 6 Barn. & Cress. 49; S. C. 9 Dow. & Ryl. 113.

SUMNER v. BATSON sued by the name of BATLEY.

Thursday,
 Nov. 17th.

MR. Serjeant *Wilde* applied for a rule, calling on the plaintiff to shew cause why the writ of *capias* issued in this cause, and the declaration and subsequent proceedings thereon, should not be set aside for irregularity. He founded his motion on an affidavit of the defendant which stated that he was described in the writ and declaration as *Thomas Batley*; that his real name was *Thomas Batson*; and that he had always gone and been known by that name and no other.

If the defendant's surname be mis-stated in a writ, the Court will not set aside the process on motion, but will leave the defendant to his plea in abatement.

The Court refused the application, saying that they would leave the defendant to his plea in abatement; as the Court of *King's Bench* had lately decided that they would not set aside process for a mere irregularity or formal defect, on motion; and that a party in such case is not entitled to indulgence; and they observed, that, on a plea in abate-

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ment, if the plaintiff enter a *cassetur*, he is not liable to costs, although he might be, if the Court were to allow the proceedings to be set aside for irregularity.

Rule refused (a).

(a) See *Sarjant v. Gordon*, 7 Dow. & Ryl. 258; *Rolph v. Peckham*, 6 Barn. & Cress. 164. In these cases, the Court of King's Bench drew a distinction, and said, that, if the defendant's name be omitted or mis-stated in *bailable* process, the Court will set it aside on motion, but that, in *serviceable* process, they will leave the defendant to his plea in abatement.

Friday,
Nov. 18th.

BUCKENHAM v. FRANCIS, WHITE, and BULLER.

Trespass for breaking open the outer-door of the plaintiff's dwelling-house, and entering therein &c. Plea, justifying the entry, generally, under a *pluries fi. fa.*

Demurrer, assigning for cause that in the plea it was not averred that the outer-door was open at the time the defendants entered under the writ:—
Held, that the plea was bad.

THIS was an action of trespass. The first count of the declaration stated, that the defendants broke and forced open, broke to pieces, and destroyed, one of the outer-doors of the plaintiff's dwelling-house, and, after having so forced open and broke the said outer-door, entered the house and made a great noise and disturbance therein, and continued making such noise and disturbance for a long time, to wit, for the space of twelve hours then next following, whereby, &c. The second count was for breaking and entering the house, and continuing therein for the space of twelve hours.

The defendants pleaded,—*first*, not guilty, on which issue was joined;—*secondly*, as to the breaking and entering the house, that the defendant *Francis* had recovered a judgment against the plaintiff in the Court of *King's Bench*; and that, for the obtaining satisfaction thereof, he, *Francis*, sued out a *pluries fieri facias*, which writ was delivered to the Sheriff to be executed; by virtue of which, he made his warrant, directed to the defendant *White*, he then being bailiff of the Sheriff, commanding him to levy on the plaintiff's goods; which warrant was afterwards delivered to

White, as such bailiff, to be executed; by virtue of which he, and the defendants *Francis* and *Buller* as the servants of *White*, and by his command, peaceably and quietly entered into the plaintiff's house in order to seize and take, and did seize and take, in execution certain goods of the plaintiff, and by sale thereof levy a certain sum; and that, in so doing, the defendants did necessarily make a little noise and disturbance in the plaintiff's house, and stay therein for the space of time in the declaration mentioned, as they lawfully might for the cause aforesaid.

To this plea the plaintiff demurred specially, and assigned for cause, that the defendants had therein attempted to justify the entering into the plaintiff's house, and whereof he had complained against them, under the said writ in the plea mentioned, and the warrant granted thereon; but that they had not stated or alleged in or by that plea, that the outer-door of the said house was, at the time of such entering, open, which was a material and necessary averment in a plea justifying an entry into a dwelling-house under civil process; and that, for any thing which appeared in the plea, the defendants might have obtained, as in fact they did, entry into the house by breaking open the outer-door thereof, which would be illegal, inasmuch as persons acting under civil process, which was the process in the plea mentioned, and under and by virtue of which the trespasses in the declaration mentioned were in that plea attempted to be justified, cannot justify the breaking open an outer-door without becoming trespassers *ab initio*; and yet, that the defendants had not in or by their plea averred or shewn that the outer-door of the dwelling-house, at the time of their entering, was open.

The defendants joined in demurrer.

The cause now came on for argument, when Mr. Serjeant *Wilde*, in support of the demurrer, was stopped by the Court, who called on—

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Mr. Serjeant *Taddy* to support the plea.—It must be admitted that the defendants could not justify the breaking open of the outer-door of the plaintiff's house, in order to execute the writ which had been sued out against him. Whether they broke open the outer-door or not, was a fact which might be proved under the general issue; but the defendants justified the trespass as to entering the house, to which the last plea was confined. It was sufficient for them to allege that they did so peaceably and quietly, for the purpose of executing the writ; and if they had not done so, the plaintiff should have taken issue on that fact. It is too much for the Court to assume that the outer-door was broken open by the defendants. If it had been, they could not be said to have entered the house peaceably, as stated in the plea. The plaintiff, therefore, ought to have replied that they had broken open the outer-door, which would be an issue in fact for the Jury. The breaking open the door, and entering the house, might have been several and distinct trespasses, committed at different times, or on different days. Although in *Se-mayne's* case it was resolved (a), that a sheriff or bailiff cannot break open the outer-door of a house, in execution of a *fieri facias* (which principle was recognized and adopted in *Lee v. Gansel* (b), on the ground that it would leave the persons within exposed to robbery); yet, here, there does not appear to have been any breach of the peace on the face of the record; and the gist of the action was the unlawful entering of the plaintiff's house, which the defendants have justified, alleging that they entered it peaceably under the writ and warrant. The plaintiff might have replied that the outer-door was locked or fastened, and that the defendants broke it open; and they could not have entered the house peaceably if that had been the fact.

(a) 5 Rep. 92 b.

(b) 1 Cowp. 1.

Lord Chief Justice BEST.—I am clearly of opinion that this plea is bad in form and in substance, as the defendants did not deny, but in fact admitted, that they had broken open the outer-door of the plaintiff's house, which was the substance of the charge in the first count of the declaration. The plea, therefore, would have been bad on general demurrer, or it might have been treated as a nullity. The trespass stated at the commencement of the first count, was, the breaking open the outer-door, and entering the house. This must be taken to be one continuing trespass; and it is quite clear that a plea of justification should contain an answer to the whole of the plaintiff's charge as alleged in the declaration, which the defendants here have not done. Although there are two counts, it was incumbent on the defendants to plead to the whole of the trespasses contained in the declaration. They have not attempted to justify the breaking open of the outer-door, as specifically charged in the first count; and it cannot be contended for a moment that they had any authority so to do.

The rest of the Court concurring—

Judgment for the plaintiff.

1825.
BUCKENHAM
v.
FRANCIS.

1825.

Friday,
Nov. 18th.

A plaintiff may be nonsuited after a plea of tender: Therefore, where the defendant pleaded *non-assumpsit* as to part, and a tender as to the residue, which he paid into Court, and the plaintiff took out; and the defendant took down the record by proviso, and the plaintiff did not appear:—*Held*, that the defendant was not entitled to a verdict: and the Court, on motion, ordered it to be set aside and a nonsuit entered.

ANDERSON v. SHAW.

THIS was an action of *assumpsit* for work and labour. The declaration stated the defendant to be indebted to the plaintiff in the sum of 100*l*. The defendant pleaded *non-assumpsit*, except as to the sum of 21*l*., and a tender of that sum, which he paid into Court, and which the plaintiff afterwards took out. The defendant then took down the record by proviso.


At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last Term, the cause being called on, and no one appearing for the plaintiff, his Lordship was about to nonsuit him, when it was insisted for the defendant that he was entitled to a verdict, on the ground that a plaintiff cannot be nonsuited after a plea of tender; and the case of *Gutteridge v. Smith* was relied on, where Mr. Justice *Heath* said (*a*), “it is clear, that, after a tender, the plaintiff cannot be nonsuited;” and *Harding v. Spicer* (*b*), where that learned Judge afterwards ruled the same at *Nisi Prius*. A verdict was therefore taken for the defendant, leave being reserved to the plaintiff to move to set it aside, and that a nonsuit might be entered instead thereof.

Mr. Serjeant *Onslow*, on a former day in this Term, accordingly obtained a rule *nisi*, and submitted, that, although it had been once doubted whether a plaintiff could be nonsuited after a defendant’s bringing money into Court, yet that there was no substantial reason for such a doubt; and that it has been since determined that a plaintiff may be nonsuited after payment of money into Court; and he contended that, on principle, the plaintiff has an equal right to be called in the case of a tender, as, in consideration of law, he

(*a*) 2 H. Black. 377.

(*b*) 1 Camp. 327.

is nonsuited, not because he has no cause of action, but because he does not appear when called, to hear the verdict; and it is a general rule, that the plaintiff may absent himself when he is demandable at *Nisi Prius*, and that his non-appearance puts an end to the suit.

1825.

 ANDERSON
 v.
 SHAW.

Mr. Serjeant *Taddy* now shewed cause, and contended, that, as the plaintiff had been guilty of laches in not proceeding to trial, so as to throw it on the defendant to take down the record by proviso; and, as the latter had not only pleaded a tender but paid the sum tendered into Court, which the plaintiff afterwards accepted and took out, he could not be nonsuited, as the judgment of nonsuit is, that the plaintiff take nothing by his writ; whereas, here, he has taken the sum tendered out of Court; and although he has done so, it cannot be inferred that he thereby intended to abandon his suit. In *Gutteridge v. Smith*, and *Harding v. Spicer*, Mr. Justice *Heath* expressly said, that there cannot be a nonsuit after a plea of tender. Although, in *Gardener v. Davis* (a), the Court resolved, that, where the issue laid upon the plaintiff, and he was to begin first, he ought to have been called and nonsuited if he did not appear, and, therefore, that the proceeding to take a verdict was irregular, and must be set aside; and Mr. Serjeant *Williams*, in a note to *Dennis v. Dennis*, states (b), that, "where the record is carried down by the defendant (as here), and the issue happens to be upon the plaintiff, who is therefore to begin first, but he does not appear, the defendant must not enter upon his proof and take a verdict, but the proper course is held to be to call the plaintiff and nonsuit him;" and in *Hicks v. Young* (c), where the defendant took down the record, and, the plaintiff not appearing, a verdict was found for the defendant, the Court, on an application by the plaintiff to set aside the verdict, ordered the

(a) 1 Wils. 300.

(b) 2 Wms's. Saund. 336.

(c) Barnes, 458.

1825.

ANDERSON
v.
SHAW.

postea to be amended, and a nonsuit entered; yet in neither of these cases had the defendant pleaded a tender or paid money into Court. By this proceeding the defendant merely admits that a cause of action exists, or that a certain sum is due to the plaintiff; but it does not prevent the latter from abandoning his suit, or preclude him from proceeding against the defendant for the residue of his demand.

Mr. Serjeant *Onslow*, in support of his rule, was stopped by the Court.

Lord Chief Justice BEST.—I certainly thought at the trial, that a verdict could not be given against the plaintiff in his absence; but I was told, on the authority of *Gutteridge v. Smith*, and *Harding v. Spicer*, that there could not be a nonsuit after a plea of tender. I was not fairly dealt with at *Nisi Prius*, as I was led to believe that the case of *Gutteridge v. Smith* had been decided by this Court *in banc*. It is impossible for a Judge at *Nisi Prius* to recollect every decided case. It is sufficient for him to act on general principles; and, on principle, there can be no doubt that a defendant cannot be entitled to take a verdict behind the plaintiff's back. According to the old practice, the plaintiff was always called; and, if he did not appear, no verdict could be given against him, as both parties must be in Court before either can be entitled to a verdict. So, now, it is the ordinary course at *Nisi Prius*, if the plaintiff's counsel, before verdict, elect to be nonsuited, and informs the Judge that the plaintiff does not appear, and he does not answer when called on, a nonsuit is entered. But, on referring to the case of *Gutteridge v. Smith*, all that there appears referrible to this point, is merely a *dictum* of Mr. Justice *Heath*; all the other Judges are silent on the subject; and although that learned Judge entertained the same opinion at *Nisi Prius*, still I think it was unfounded

in point of law. There can be no doubt but that a plaintiff may be nonsuited after a payment of money into Court by the defendant; and there is no distinction to be drawn between that case and a tender, as, in either case, where the plaintiff takes the money out of Court, he takes something by his writ. But he might be satisfied with such payment, or with the sum tendered, and might not think proper to proceed further with his action. How then can the defendant be entitled to a verdict when the plaintiff does not appear in Court, or profess to recover any more than the sum tendered, or proceed further on his writ?

1825.
 ANDERSON
 v.
 SHAW.

Mr. Justice PARK.—I am of the same opinion. I have always understood that a plaintiff could not have a verdict entered against him unless he appeared at the trial; and, although I have made diligent search, I can find no case which has established a different rule. The ancient practice of calling the plaintiff in Court appears to me to be consistent with good sense; for, if he did not appear, no verdict could be recorded against him. The course was thus:—after the Jury had considered their verdict, the officer of the Court asked them if they were agreed; if they answered in the affirmative, the officer then called the plaintiff by name to hear the verdict, and, if he appeared, the verdict was pronounced; but, if he did not appear to prosecute his suit, he was nonsuited (a). So, where the defendant suffers judgment by default on *nil dicit*, he appears and says nothing in bar or preclusion of the action, and the entry on the *postea* is “whereby the said *A. B.* remains undefended, wherefore the plaintiff ought to recover his damages.” In a note to the case of *Harding v. Spicer*, Mr. Campbell says, that, in joint actions against several defendants, the plaintiff cannot

(a) This practice prevailed at *Bristol* within the last twenty years.

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 ┌
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be nonsuited as to one of them only, by reason of the incongruity which would there arise; but that he found no other case establishing any other exception to the rule that the plaintiff might absent himself when he is demandable, and that his non-appearance puts an end to the suit. Although we have been pressed with the opinion of Mr. Justice *Heath*, who was undoubtedly a most learned Judge, yet the current of authorities is the other way; and what fell from him in *Gutteridge v. Smith* was extrajudicial, as the question arose on the payment of money into Court; and it is now too clear to be doubted for a moment, that a plaintiff may be nonsuited after such payment.

Mr. Justice BURROUGH.—If a plaintiff do not appear when called at *Nisi Prius*, the invariable course is, to enter a nonsuit. The plea of tender goes only to a part of the plaintiff's demand, and a verdict cannot be given against him in his absence.

Mr. Justice GASELEE.—The entry on the *postea*, in the case of a nonsuit, is, "the jurors having withdrawn from the bar to consider of their verdict, after they had considered and agreed among themselves, they returned to the bar to give their verdict, upon which the plaintiff being solemnly called, comes not, nor doth he prosecute his bill (or writ) against the defendant." The plaintiff, therefore, may elect to be nonsuited at any time before verdict. Although it was formerly held that there could not be a nonsuit after payment of money into Court; yet, a different doctrine now prevails. The same principle may equally apply to a plea of tender.

Rule absolute, with costs, the plaintiff consenting to a *stet processus* (a).

(a) See *Hodgson v. Forster*, 1 Barn. & Cress. 110.

1825.

MUNN v. GODBOLD and Another.

Saturday,
Nov. 19th.

THIS was an action of covenant. The declaration stated, that, on the 11th *September*, 1819, by articles of agreement under seal, made between the defendants and the plaintiff (but which having been lost by accident, the plaintiff could not produce) after reciting that the defendants, for the considerations therein mentioned, had agreed with the plaintiff to appoint him their agent for the sale of their *Vegetable Balsam* on the continent of *Europe*, it was witnessed, that, in consideration of 300*l.* paid by the plaintiff to the defendants, they would deliver to him so much of the *Vegetable Balsam* as, being sold at the rate of twenty francs *French* currency for each pint, would produce 600*l.*, whereby he would be allowed 50 *per cent.* upon the sum for which the medicine should sell, and that the same allowance should be made by the defendants for any quantity that should be transmitted to the plaintiff to be sold on the continent of *Europe*; and it was further agreed, that the defendants should at all times supply the plaintiff with any quantity of the said *Vegetable Balsam*, in quantities not less than were of the value of 300*l.*, upon the terms aforesaid; and that, in case the plaintiff should not be able to dispose of the quantity of medicine equal in value to 600*l.*, the defendants should take back the whole thereof at the same price the plaintiff paid them for the same, or any quantity that he should have on his hands unsold, or any part thereof, at any time when the plaintiff should be desirous of relinquishing his agency, after the end of six months after delivery. The plaintiff then averred, that the defendants delivered to him to be sold, a quantity of *Vegetable Balsam*, which, being sold at twenty francs *French* currency each pint, would have produced 600*l.*; and that, although the plaintiff sold a quantity which produced the sum of 13*l.* 6*s.* 8*d.*, and

In covenant, on articles of agreement under seal, the plaintiff alleged in his declaration that the deed was lost, and proved that two parts were executed; that the part executed by him was delivered to the defendants, and that the part executed by them was delivered to him, and duly stamped, previously to the loss. At the trial, the plaintiff offered in evidence a draft or copy of the deed; but, he having given the defendants notice to produce their part, they did so:—*Held*, that, although it was the best, still that it was only secondary evidence of the contents of the lost deed, and might therefore be received without a stamp.

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GODBOLD.

although six months had elapsed from the time of the delivery, and the plaintiff had been desirous of relinquishing his agency, yet that the defendants would not, although requested so to do, take back the residue of the said *Vegetable Balsam* in the hands of the plaintiff so unsold, or pay him the price he paid for the same.

The defendant pleaded *non est factum*, and four special pleas, on which issues were joined.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last Term, it appeared that two parts of the agreement declared on had been executed, *viz.* the one by the plaintiff, and the other by the defendants; that the part executed by the defendants had been left in the hands of the plaintiff, and that the part executed by the latter had been delivered over to the former. The plaintiff called a witness, who proved that the plaintiff left the agreement executed by the defendants with him, the witness, and that he had afterwards lost or mislaid it, and had not been since able to find it. He also proved that it had been duly stamped. The plaintiff then called the attorney by whom the agreement was prepared, who offered to give in evidence an examined draft or copy, which he swore was a true copy of the instrument when it was completed and signed; but, notice having been given to the defendants to produce the counterpart executed by the plaintiff, they did so, when it appeared that it had not been stamped. It was then insisted for the defendants, that the draft could not be received, as the counterpart, which was the next best evidence, was ready to be produced, but was not admissible for want of a stamp. His Lordship, however, was of opinion that the counterpart, not being produced as a deed, but merely as secondary evidence to shew the contents of the instrument which was lost, was admissible without a stamp, particularly as the plaintiff had proved that his part which had been lost

had been duly stamped. The Jury accordingly found a verdict for the plaintiff.

1825.

MUNN

P.

GODDOL.D.

Mr. Serjeant *Bosanquet*, on a former day in this Term, obtained a rule *nisi* that this verdict might be set aside and a nonsuit entered, or a new trial granted, and submitted, that, as the plaintiff had given the defendants notice to produce the counterpart of the deed executed by him, and as they did produce it, the draft or copy of the original could not be received in evidence; and, as the deed was not perfect without the counterpart, it was the next best evidence. In *Roe d. Haldane v. Harvey*, Mr. Justice *Willes* said (a): "It is reasonable, that, if one party is in possession of a deed, and refuses, after proper notice, to produce it, the other side should be admitted to prove the contents by inferior evidence: but there is no reason why the possessor of the deed should be allowed to give such inferior evidence, when he *can* give better if he pleases." Here, the plaintiff might have applied for a copy of the defendants' part of the deed before the trial, or for an inspection of it for the purpose of ascertaining whether it had been stamped or not (b). In *Rippiner v. Wright*, the Court said (c): "It is the duty of the parties to an agreement to take care that when it is executed it is properly stamped; and it is one of the risks attendant upon an omission to do this, that, if any accident happens to the agreement before the stamp is affixed, there is no remedy upon it whatsoever." So, here, the plaintiff should, at all events, have ascertained that the counterpart in the possession of the defendants had been duly stamped, before he gave them notice to produce it at the trial.

Mr. Serjeant *Wilde* now shewed cause.—The plaintiff

(a) 4 Burr. 2489.

Moore, 71.

(b) See *Gigner v. Bayly*, 5 B.

(c) 2 Barn. & Ald. 479.

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v.
GODBOLD.

having alleged in his declaration, that he could not produce the deed, as it had been lost by accident, and the defendants not having counterpleaded or denied that allegation, it must be assumed to be true; and, as the plaintiff proved, that, after the execution by the defendants of that part of the deed which had been delivered to him, it had been duly stamped, the next best evidence was the draft from which it was copied, which the plaintiff not only produced, but was ready to prove to be a true copy of the lost instrument. As the counterpart produced by the defendants was not executed by them, but only by the plaintiff, he could not use it as a deed to charge them; and, consequently, it could only be read as a copy, and was, therefore admissible without a stamp, it being merely secondary evidence of the contents of the part which was lost. In *Hawley v. Peacock* (a), it was held, that, if a deed pleaded as lost by time and accident, be afterwards found, it may be given in evidence at the trial; and Lord *Ellenborough* there said: "The averment of the loss of the deed relates to the time of plea pleaded;" and here, the defendants have not denied the allegation of the loss. The plaintiff sought to charge the defendants on the deed executed by them, and, having averred that it was lost, he was entitled to produce the draft, and prove that it was a true copy. It does not follow that the counterpart executed by the plaintiff contained the same stipulations as that part of the deed which was executed by the defendants and delivered to him; and, if both the draft and counterpart were inadmissible, the defendants would obtain an advantage by their own wrong in omitting to have the latter stamped. But, if the counterpart be considered as a mere copy, it was admissible in evidence, without a stamp, for the purpose of proving the contents of the deed declared on.

(a) 2 Camp. 557.

Mr. Serjeant *Bosanquet*, in support of his rule.—The plaintiff having lost the part of the deed executed by the defendants and delivered to him, on which alone he could declare against the defendants, the best evidence to prove the contents of that deed was the counterpart, which was inadmissible for want of a stamp. In the case of *The King v. Castleton* (a), it was proved that two parts of an indenture of apprenticeship had been executed, that one had been destroyed, and that the other had come to the hands of a third person, who, when asked for it, said he could not find it; but, as he was not subpoenaed to give evidence or called on to produce it, it was held, that the evidence offered was insufficient, as it should either have been shewn that both parts had been lost or their non-production should have been accounted for. In *Villiers v. Villiers*, Lord *Hardwicke* said (b): “The rule of evidence is, that the best evidence the circumstances of the case will allow must be given. If an original deed is lost, the counterpart may be read; and, if there is no counterpart forthcoming, then a copy may be admitted.” In *Buller’s Ni. Pri.* (c), it is said, that, where it is proved that the deed itself is destroyed by fire, a copy of it may be given in evidence; but, perhaps, in such case, if it came out in evidence that there are two parts executed, and the loss of one only was proved, a copy would not be admitted. It is, therefore, quite clear that the counterpart, or the part of the deed in the hands of the defendants, was the best evidence of the contents of the part which was lost; and the plaintiff so considered it, as he gave the defendants notice to produce it; and, when produced, it could not be treated as a copy, but as an original deed; and, as it was under seal, it was inadmissible in evidence without a stamp, which should have been affixed at the time of the date or execution of the instru-

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v.
GODBOLD.

(a) 6 Term Rep. 236.

(b) 2 Atk. 71.

(c) 7th Edit. by Bridgman, 254.

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 ┌
 MUNN
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ment. The 55th *Geo.* 3, c. 184, imposes an *ad valorem* duty on instruments of this description; and the counterpart should have had a separate stamp, as each part contained more than the limited number of words (*a*); and although it may be said, that both instruments refer to the same subject-matter, yet, as they were executed by each party separately, each should have been stamped; and, as the counterpart was the best, if not the only, evidence to prove the contents of the lost deed, it ought not to have been received, as it was not stamped; nor could the plaintiff avail himself of his draft or copy, he having given the defendants notice to produce their part of the agreement, with which they duly complied.

Lord Chief Justice BEST.—This was an action of covenant on articles of agreement under seal entered into between the plaintiff and the defendants. It was proved at the trial, that two parts of the deed or instrument containing the terms of the agreement were executed, *viz.* one part by the plaintiff, which was delivered to the defendants, and the other by the defendants, which was delivered to the plaintiff. The plaintiff then proved that he had lost the part delivered to him, having previously procured it to be stamped. He had no reason to suppose that the defendants would not get their part stamped also; and, as he excused himself from producing his part, by alleging that it was lost, he had a right to give his draft

(*a*) By the statute 55 *Geo.* 3, c. 184, Sched. part 1, tit. "Deed," on instruments of any kind whatever, not otherwise charged in the schedule, nor expressly exempted from all stamp-duty, a duty of 1*l.* 15*s.* is imposed;—and, where the same, together with any schedule, receipt, or other matter, put

or indorsed thereon, or annexed thereto, shall contain 2,160 words or upwards, then, for every entire quantity of 1,080 words contained therein, over and above the first 1,080 words, a further progressive duty is imposed, of 1*l.* 5*s.*

or copy in evidence, which was done; but, he having given the defendants notice to produce their part, they did so, and, as it was not stamped, it was insisted on their behalf that it could not be read, and that, as the counterpart was the best evidence of the contents of the lost deed, the draft or copy offered by the plaintiff could not be received. I thought that the counterpart was not to be considered as being produced as a *deed*, but merely as secondary evidence of the contents of that lost, and consequently, that it required no stamp. At all events, as the plaintiff proved that his part of the deed had been properly stamped previously to the loss; and, as the defendants had not done their duty in procuring their part to be stamped also, I think it was admissible, it being only used as an authenticated copy of the deed executed by the defendants, which the plaintiff could not produce, it having, as he alleged, been lost.

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 Munn
 v.
 Godbold.

The rest of the Court concurring—

Rule discharged (a).

(a) See *Waller v. Horsfall*, 1 Camp. 501; *Garnons v. Swift*, 1 Taunt. 507.

—◆—
 THORPE v. GISBOURNE.

Tuesday,
 Nov. 22d.

AT the trial of this cause, before Lord Chief Justice *Best*, at *Westminster*, at the Sittings after the last *Easter Term*, a witness of the name of *Hunter* not having obeyed a *subpœna*, nor been in attendance when the cause was called on—

A motion for an attachment against a person subpœnaed as a witness, for not attending at a trial, must be made within the Term succeeding the tri-

al, and a copy of such *subpœna* must be delivered personally at the time of service.

1825.

THORPE

v.

GIBBOURNE.

Mr. Serjeant *Wilde*, on a former day in this Term, obtained a rule *nisi* for an attachment against him.

Mr. Serjeant *Vaughan* now shewed cause, and submitted, that the application for the attachment was too late, as *Trinity* Term had intervened since the service of the *subpœna*, and no steps had been taken in the course of that Term. The learned Serjeant also produced several affidavits, which shewed that *Hunter* was subpœnaed on the race-course at *Epsom*, during his attendance at the races there; but it did not appear that a copy of the *subpœna* had been personally delivered to him, or that it had issued out of this Court (*a*).

Mr. Serjeant *Wilde*, in support of his rule, was stopped by the Court.

Per Curiam.—As the party applying for the attachment against *Hunter* for not obeying the *subpœna*, has not shewn us that a copy was delivered to him personally, there is no sufficient proof of service on him, without which he cannot be brought into contempt. But, independently of this, a motion for an attachment against a person subpœnaed as a witness, for not attending, should, as in other cases of contempt, be brought forward as soon as possible; and therefore, in the case of ——— v. *St. Leger* (*b*), the Court of *King's Bench* refused an attachment in *Hilary* Term, for the non-attendance of a witness at the preceding Summer Assizes, and left the party complaining to his civil remedy. We intend to adopt this rule in future; and, unless an application for an attachment be made in the Term succeeding the service of the *subpœna* and

(*a*) See *Smalt v. Whitmill*, 2 Str. 1054.

(*b*) 2 Tidd, 9th Edit. 808.

trial, it cannot be entertained. This rule, however, must be—

Discharged without costs.

1825.

THORPE
v.
GIBBOURNE.

LAKE v. STEPHEN THOMAS SILK. sued by the name of
STEPHEN T. SILK.

Tuesday,
Nov. 22d.

A RULE nisi was obtained by Mr. Serjeant *Bosanquet*, on a former day in this Term, that the bail-bond, which had been given by the defendant in this cause, might be delivered up to be cancelled, and all further proceedings stayed, on his entering a common appearance, on an affidavit which stated that he was arrested, under a writ of *capias ad respondendum*, by the name of *Stephen T. Silk*, and that he afterwards executed a bail-bond to the Sheriff of *Surrey*, in the name of *Stephen Thomas Silk*, which was his true name, and by which alone he had been always called and known. The learned Serjeant relied on the case of *Taylor v. Rutherman* (a), where the Court discharged a defendant on entering a common appearance, on his undertaking to bring no action, he having been arrested by the initials of his christian name only, and signed the bail-bond in like manner.

The defendant having been arrested by the name of *Stephen T. Silk*, signed a bail-bond in his full name, *Stephen Thomas Silk*:—The Court ordered the bail-bond to be cancelled, on the defendant's undertaking to bring no action; but observed, that, in future, they would, in such cases, leave the party to his plea in abatement.

Mr. Serjeant *Vaughan* afterwards shewed cause, and submitted, that, as the defendant had signed the bail-bond by his right name, he had waived the irregularity (if any) in the writ; that the cards of the defendant's address, and the names on the door of his house, were *Stephen T. Silk*; and that he had in the same way signed a letter addressed to the plaintiff, in which he pro-

(a) 6 B. Moore, 264.

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LAKE
v.
SILK.

mised to pay him the amount of the debt for which he was arrested.

Mr. Serjeant *Bosanquet*, in support of his rule.—Although in *Howell v. Coleman* (a), the Court refused to order a bail-bond to be delivered up, because the defendant had been arrested on a writ in which the initials of his christian name only were inserted; yet, in *Reynolds v. Hankin* (b), where a defendant was arrested under similar circumstances, the Court of *King's Bench* held it to be irregular, and said that it was not sufficient to describe a person by the initials of his christian name only. This Court acted on the authority of that case, in *Taylor v. Rutherman*: and notwithstanding that it was there suggested that the defendant, having signed the bail-bond in the same manner as he was described in the writ, might be said to have waived the irregularity, the Court thought, that, as the bail-bond was given under duress, it did not cure the defect in the writ.

[Mr. Justice *Gaselee* observed, that, if the bail-bond were cancelled, the plaintiff would be placed in a far worse situation than he would be in if the defendant were put to his plea in abatement; as, in the one case, the defendant might be arrested on another writ, whilst, in the other, the plaintiff would be altogether deprived of the benefit of bail.]

Cur. adv. vult.

Lord Chief Justice BEST now said—We find ourselves fettered by the late decisions in this Court and the Court of *King's Bench*, in the cases referred to by my brother *Bosanquet*; and, as the party in this case may have acted on

(a) 2 Bos. & Pul. 466.

(b) 4 Barn. & Ald. 536.

these decisions, we are of opinion that the bail-bond must be delivered up to be cancelled, on the defendant's entering a common appearance and undertaking to bring no action, as was done in *Taylor v. Rutherman*. But we beg it to be understood, that, in future, where a party signs a bill of exchange, or otherwise describes himself, by his initials only, if he refuse to give his full christian name, we will not relieve him on motion, but will leave him to his plea in abatement.

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Rule absolute, without costs(a).

(a) See *Fahrbrodh v. Solliers*, 10 B. Moore, 322; *Sumner v. Batson*, ante, p. 39.

BROOKE v. CARPENTER.

Wednesday,
Nov. 23rd.

THIS was an action on the case against the defendant for maliciously lodging a detainer against the plaintiff whilst she was in the custody of the warden of the *Fleet*, and causing her to be detained in such custody at the plaintiff's suit in an action on a bill of exchange for 10*l.*, the plaintiff having no reasonable or probable cause for such detainer. The declaration stated, that the defendant, without any reasonable or probable cause of action against the plaintiff, had falsely and maliciously caused and procured a detainer to be lodged against her at the office of the warden of the *Fleet*, and had caused her to be thereupon kept and detained in prison for a long time, to wit, &c.;—it was then averred, that such proceedings were thereupon had in the suit on which she was

In an action on the case against the defendant, for maliciously lodging a detainer against the plaintiff, the declaration averred that the suit (in which the detainer was lodged) was determined by a rule of Court, by which it was ordered that the plaintiff should be discharged out of custody, and the proceedings stayed:—*Held*, that the rule was sufficient evidence to support the


allegation; although it was objected, that it was obtained merely on the oath of the plaintiff, who would, by its admission, be, in effect, giving evidence in her own cause.

1825.
BROOKE
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so detained, that, in *Easter* Term, 1825, by a certain rule or order made in the said suit by the Court of *Common Pleas*, it was ordered that the defendant in that suit (the present plaintiff) should be discharged out of the custody of the warden of the *Fleet* as to the plaintiff's (now defendant's) suit in that action, and that all further proceedings in the cause should be stayed, and the bill of exchange on which the action was brought be delivered up to the defendant; and that the said action was, and is, by means of the premises, and according to the course and practice of the said Court, wholly ended and determined.

At the trial, before Lord Chief Justice *Best*, at *Westminster*, at the Sittings after the last Term, the warden of the *Fleet* stated, that a detainer had been lodged against the plaintiff by the defendant, on the 21st *November*, 1824, for the sum of 10*l.*, which he alleged to be due to him as the balance of a bill of exchange; and that the defendant was the only detaining creditor. It also appeared that the plaintiff had applied to the Court to discharge him out of custody, when, on cause being about to be shewn, it was ordered that all the matters should have been referred to the Prothonotary. A clerk from the Prothonotaries' office produced a rule in the terms stated in the declaration, and said that the rule was obtained on the affidavit of the plaintiff; when it was objected for the defendant, that the rule was not receivable in evidence, as it did not shew that the original suit had determined, the Court having merely ordered all further proceedings in the cause to be stayed; or that, at all events, it could not be admitted as evidence of a malicious detainer, as it was obtained on the oath of the plaintiff, the then defendant, and she could not, either directly or indirectly, give evidence in her own cause. His Lordship, however, was of opinion that the rule was admissible for the purpose of shewing that the former suit was at an end; and the Jury found a verdict for the plaintiff—damages 300*l.*, leave being expressly reserved

to the defendant to move to set it aside, and enter a non-suit, in case the Court should be of opinion that the rule ought not to have been received in evidence.

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Mr. Serjeant *Wilde*, on a former day, accordingly obtained a rule *nisi*, and relied on the case of *Habershon v. Trosby* (a), where, in a suit for maliciously holding the plaintiff to bail, the cause was referred, and the arbitrator found that the plaintiff had no cause of action—Lord *Kenyon* held, that the evidence of the arbitrator was inadmissible to shew what transpired before him, on the principle, that the parties themselves could not have been examined in the former cause. So, here, as the rule was obtained on the affidavit of the plaintiff, she could not avail herself of it in this suit.

Mr. Serjeant *Vaughan* and Mr. Serjeant *Lawes* now shewed cause.—The only question is, whether the original suit on the bill of exchange was determined according to law. There can be no doubt that it was; and the rule of Court was properly received, and is conclusive evidence of the fact. In *Bristow v. Haywood* (b), Lord *Ellenborough* held, that, in an action for a malicious arrest, an averment that the suit was wholly ended and determined, was proved by the production of a rule to discontinue upon payment of costs, and shewing that the costs had been taxed and paid; and, although the case of *Kirk v. French* (c) was there relied on, in which it was held, that, in an action of this nature, in order to shew that the former suit was determined, it was not enough to put in a judge's order to stay proceedings on payment of costs, and to prove that the costs were paid accordingly; yet Lord *Ellenborough* drew this distinction, and said: "A judge's order to stay the proceedings may not be enough to shew

(a) 3 Esp. N. P. C. 38. (b) 4 Camp. 214; S. C. 1 Stark. N. P. C. 48.

(c) 1 Esp. N. P. C. 80.

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the cause determined; but, where there is a rule of Court to discontinue, on which the party obtaining it has acted by paying the costs, I think this is at least *prima facie* sufficient." Although the rule was obtained on the affidavit of the plaintiff, it was admissible for the purpose of shewing that the former suit had been determined: in fact, it was the only evidence of its determination. Besides, the rule was not obtained on the oath of the plaintiff alone; nor was it drawn up on an *ex parte* statement. Both parties were before the Prothonotary; and there can be no doubt but that he decided according to the merits. A decree in Equity is founded on the oath of the party. So, a party robbed may give evidence in an action against the hundred for the robbery. Convictions by magistrates, when produced in evidence, are conclusive as to the facts stated therein; and they are obtained on the oath of the parties. If a rule *nisi* be granted on the affidavit of the party, and, no cause being shewn, it is made absolute, there can be no doubt but that such rule is admissible in evidence, as it is an act of the Court. *A fortiori* the rule is receivable, where both parties have appeared and been heard by the Court; and here, the Prothonotary was appointed by the Court to determine the question between the litigant parties. He had a peculiar jurisdiction, and was placed in the situation of an arbitrator. In *Warne v. Bryant* (a), where a cause was referred to an arbitrator, with liberty to him, if he should think fit, to examine the parties, it was held that he might examine a party to the suit in support of his own case—the Court saying: "the arbitrator is to exercise his discretion in all cases, whether he will allow a party to be examined at all. In practice, many causes are referred, for the express purpose of having the parties to the suit examined, which cannot be done in a Court of law." In *Cameron v. Reynolds* (b), a rule of Court, ordering all further proceedings in an ac-

(a) 3 Barn. & Cress. 590.

(b) Cowp. 406.

tion to be stayed, was admitted in evidence in an action against an under-sheriff for breach of duty.

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Mr. Serjeant *Taddy*, Mr. Serjeant *Peake*, and Mr. Serjeant *Wilde*, in support of the rule.—It was incumbent on the plaintiff, in order to sustain this action, to shew the determination of the suit in which the writ was issued and the detainer lodged against her. The rule merely directed that all further proceedings in the action on the bill should be stayed; but it was given in evidence for the purpose of shewing that the suit was altogether ended and determined. The principal ground of objection is, that the rule was obtained on the affidavit of the plaintiff herself. She could not have been called to prove that the defendant had no cause of action against her on the bill of exchange; and in *Habershon v. Troby*, Lord *Kenyon* thought that an arbitrator ought not to be permitted to disclose what transpired before him, in order to shew that the plaintiff was maliciously held to bail in an action brought against him by the defendant, upon the principle that the parties themselves could not have been examined in the former cause. So, here, as the rule was obtained on the affidavit of the plaintiff, it would, if received, have the effect of enabling her to give evidence in her own cause; and it is a well known principle, that that cannot be done through indirect, which may not be accomplished by direct means. In *Gilbert on Evidence* (a), it is said, that “in an action of trespass, the indictment for the same trespass, and verdict for the same trespass, shall not be given in evidence, if the indictment be only found on the party’s own oath; for, if the party’s oath be no evidence in his own cause, then cannot the verdict be any evidence, that is founded only on the party’s own oath; for, what cannot be made evidence directly, cannot be made evidence by

(a) Page 30.

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any such circuitry." In *Hathaway v. Barrow* (a), which was an action on the case for a conspiracy, it appeared that the defendants had been convicted of the same conspiracy, upon an indictment preferred against them by the plaintiff; and Sir *James Mansfield* refused to admit the record of their conviction as evidence in support of the action, as it proceeded partly on the testimony of the plaintiff, who, if it were admitted, would in effect be swearing in his own cause. The same principle is applicable to this case. Although, in the case of *The King v. Boston* (b), *A.* having brought an action against *B.*, the latter filed a bill in Equity for an injunction, and, after answer put in by *A.*, denying the allegations in the bill, the injunction was dissolved, and *A.* was afterwards indicted for perjury alleged to have been committed in his answer, and the indictment came on to be tried immediately before the action—it was held that *B.* was a competent witness in the prosecution, and had properly been admitted to give evidence; yet that was on the ground that he could not avail himself of the conviction of *A.* in any civil proceedings between them, either in law or equity. In *Burdon v. Browning*, Sir *James Mansfield* said (c): "In all my memory an idea never was entertained, that a conviction proceeding on the testimony of a witness who was party to a civil suit, ever could be made use of by that party in the suit in which the perjury was committed. It would quite militate with the first principles of the law of evidence." It, therefore, follows, that, although the record of a conviction may be given in evidence on the same matter, in a civil action, yet it must at least be understood with this limitation, that the party who offers such evidence was not a witness on the prosecution. Although, on an indictment for robbery, the evidence of the person rob-

(a) 1 Camp. 151.

(b) 4 East, 572.

(c) 1 Taunt. 522.

bed may be admitted, yet the necessity of the case absolutely requires it; for, in many instances, no other evidence can be adduced than the testimony of the party. But here, the rule of Court might have been procured on other evidence, and without the affidavit of the plaintiff; and, as the present action could only be supported by the proof and production of that rule, it ought not to have been admitted. At all events, the proof of the several proceedings ought, in an action of this description, to correspond with all the averments in the pleadings; and here, the plaintiff has alleged in his declaration that the former suit was ended and determined, whilst the rule on which that allegation is founded merely states, that all further proceedings in that cause were to be stayed.

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Lord Chief Justice BEST.—I am of opinion that there is no ground for this application. I was extremely desirous that it should be made to the Court, as I had no note of my summing up to the Jury, and I feared that I might have pressed the admissibility of the rule of Court further than I ought, and applied it to the merits, or to the question of malice or want of probable cause, so as to influence the minds of the Jury. But it has now been admitted that the rule was only used for the purpose of shewing that the original suit was at an end, a fact which it was incumbent on the plaintiff to prove, in order to sustain the allegation in her declaration; and I am clearly of opinion that it was admissible for that purpose, as it was the only evidence by which that fact could be proved. If the rule were not receivable, it would be impossible to prove the fact that the original suit was terminated: and, if so, an action for a malicious arrest could in few cases be sustained. If the argument for the defendant were allowed to prevail to its full extent, it would have this tendency, *viz.*, that, although a suit has been terminated by a rule of Court, however oppressive and unjust the proceedings may have been,

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still that the injured party could have no redress for the wrong he had sustained thereby. That appears to be a most dangerous and mischievous doctrine. Although in *Habershon v. Tropy*, where the original cause was referred to arbitration, and the arbitrator made his award after examination of the parties, and an inspection of the plaintiff's books, Lord *Kenyon* refused to admit the arbitrator as a witness in an action for a malicious arrest; yet there it was proposed that he should be examined as to the facts which appeared before him; and, having found that the plaintiff had no cause of action, he certainly ought not to have been permitted to depose as to what transpired before him, his opinion being founded on the examination of the parties, which could not have been received in the original suit; and also on an inspection of the plaintiff's books, which the plaintiff could not have been compelled to produce at the trial; besides, it was not intended to call him, to shew that the original suit had terminated. But, if evidence could have been procured *dehors* the award, to shew that the suit had been legally put an end to, I am of opinion that it would have been sufficient to support the action for a malicious arrest: if not, a party might suffer the greatest injury and oppression, without being enabled to procure relief. It would be most unjust to say, that a party wrongfully imprisoned could obtain no redress, because he had assented to a reference, by which the justice of the case might be fully attained without putting him to the expense of a trial, or protracting the term of his confinement. Although it may be said that a suit is not terminated by an award, yet, if it can be proved by evidence not before the arbitrator, that there was no probable cause of arrest, and that the conduct of the party was malicious, the award alone would not prevent the injured person from seeking redress. What are the facts in this case?—The plaintiff at first applied to the Court to be discharged out of custody, when we recommended that all the matters in

dispute should be referred to the Prothonotary, to which both parties assented; and on his award the rule of Court was founded. We must, therefore, assume that there was no probable cause for the plaintiff's detainer; and, if so, we ought not to discountenance an action of this description.—With respect to the objection that the rule was not admissible, as it was obtained on the affidavit of the party,—it is unnecessary to infringe or touch on the general principle, that a judgment or verdict in a criminal case cannot be used, in a civil suit, by the party on whose testimony such verdict was obtained, as evidence for him of the fact found by it; for, in such case, a conviction is no evidence in support of civil rights. But there are cases where that principle does not apply. In *Johnson v. Browning* (a), which was an action for a malicious prosecution of the plaintiff's wife for felony, and no one but herself was present at the time the supposed felony was committed, Lord Chief Justice *Holt* allowed her oath, which she made at the trial of the indictment, to be given in evidence to prove a felony committed; “for otherwise,” said his Lordship, “one that should be robbed would be under an intolerable mischief; for, if he prosecuted for such robbery, and the party should at any rate be acquitted, the prosecutor would be liable to an action for a malicious prosecution, without a possibility of making a good defence, though the cause of prosecution were ever so pregnant.” In *Buller's Nisi Prius* (b), it is said: “The grounds of an action for a malicious arrest are, on the plaintiff's side, innocence; on the defendant's, malice. However, as it may come to be left to a Jury, it is advisable for the defendant to give proof of a probable cause, if he be capable of doing it; and, for this purpose, proof of the evidence given by the defendant on the indictment is good (*Cobb v. Car, Midd. Mich.* 1746).” There are also instances where parties in a

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(a) 6 Mod. 216.

(b) 7th Edit., by Bridgeman, 14.

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cause are, from the necessity of the case, permitted to be examined; as, in an action against the hundred, on the statute of *Winton*, the party robbed is a competent witness to prove the robbery, on the ground, that, in such a case, no person is near the spot at the time the robbery is committed, except the thieves and the party plundered. Where, therefore, the necessity of the case requires it, or it is absolutely impossible to procure other testimony, the parties in the suit may be examined; and here, the rule of Court was receivable, on the principle of necessity; as, without it, the plaintiff could not have maintained her action. But it has been said that the rule might have been obtained by other evidence, independently of the affidavit of the plaintiff. Although that might be so, yet it would be too much for us to say that a rule of Court could not be received in evidence, because it was obtained in part on the affidavit of the applicant. It would be most unjust and oppressive. A party, as in this case, might be immured in prison, when none but himself could fully disclose the circumstances which led to his confinement; and, in case of illness, he might be allowed to remain and die there, unless he were permitted to obtain relief by a proper application to the Court. On a full and explicit statement of all the facts, in an affidavit made by the party, we may give redress, where it appears that the cause of imprisonment or detention is unlawful or unjust. No danger can arise in a case of this description; and here it could not be proved that the original suit in which the plaintiff was detained was determined, otherwise than by the production of the rule, from which it appears that the proceedings were ordered to be stayed, and the bill of exchange on which the action was founded delivered up to the plaintiff. On an application to the Court for relief, or to set aside proceedings for irregularity, I have frequently heard complaints, that the party himself has made no affidavit, as he alone could give a

proper account of the transaction. So, here, the plaintiff was best able to state all the circumstances attending the action brought against her. I am, therefore, of opinion, that, as the Prothonotary ordered the bill on which the original action was brought to be delivered up to the plaintiff, and all the proceedings in that suit to be stayed, and a rule of Court was drawn up to that effect, that rule was necessarily admitted in order to shew the nature of the proceedings, and was clearly receivable for that purpose. This rule, therefore, must be discharged.

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Mr. Justice PARK merely expressed his concurrence, as he had not been in Court during part of the argument.

Mr. Justice BURROUGH.—Although I entertain no doubt whatever on this point, I am extremely happy that it has been brought before the Court. The only purpose for which the rule was produced at the trial, was, to shew that the original suit had been determined, not that the plaintiff in that suit had been actuated by malice, or had detained the defendant in custody without reasonable or probable cause. In the case of *The King v. Whiting (a)*, which was an information for a cheat in obtaining a person's signature to a note of 100*l.*, instead of 5*l.*, Lord *Holt* rejected the testimony of the person supposed to have been cheated, as his Lordship said, that though the verdict on the information could not be given in evidence in an action on the note, yet the Court was sure to hear of it to influence the Jury; but, in *The King v. Bray (b)*, Lord *Hardwicke*, after reviewing that case, decided, that the objection went rather to the credit than to the competency of the witness; and, with respect to the possibility that the Jury might hear of the verdict, his Lordship said, that, sitting as a Judge, he could only hear of it judi-

(a) 1 Salk. 283.

(b) Cas. temp. Hardw. 359.

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cially. It, therefore, follows that a witness is not incompetent on the ground that the verdict may afterwards come to the hearing of a Jury, in an action brought by the witness himself. Here, however, the rule was not produced for that purpose, but merely to shew that the Court ordered the proceedings in the former suit to be stayed; and the means by which the rule was obtained was quite immaterial, whether at the mere instance of the applicant or otherwise. She, in the first instance, applied to be discharged out of custody. The application was properly founded on her affidavit; and it would be most injurious to the liberty of the subject if the present objection could avail. The plaintiff was most unjustly detained in prison at the suit of the defendant; and the only mode by which she could be relieved, was, by an application to the Court. She surely could not have been prevented from making that application; and, in the result, she obtained the remedy she sought. We left it to the Prothonotary to enquire into the circumstances of the case. A discretionary power was vested in him, and the ground and reasons of complaint must necessarily have come before him on the affidavit of the party who was confined in gaol, and the rule was drawn up according to his decision. In an action against the hundred for a robbery, the party robbed may be a witness, *ex necessitate*, although he has an interest in the result. So, in many cases, where, from their nature, it is impossible to procure other testimony, the evidence of the party in the cause may be received. Here, the rule of Court was receivable from necessity, as, without it, this action could not have been supported; and its having been obtained on the affidavit of the party appears to me to be immaterial.

Mr. Justice GASELEE.—Although this question has been argued at very considerable length, it appears to me to lie

in a very narrow compass. In order to sustain an action on the case for a malicious arrest or detainer of a party in custody, it is incumbent on the plaintiff to prove that the suit in which he was arrested or detained, is determined; otherwise, it may happen that the plaintiff in that action may obtain a verdict, by which it would be evident that there was no ground to support the action for a malicious arrest. But it is also necessary for the plaintiff, in an action of this description, to allege in his declaration, not only the determination of the suit in which the writ was sued out, but the means by which such suit was ended. Here, the original suit was determined by a rule of Court, and that fact could only be proved by the production of the rule itself. It was not given in evidence with a view to affect the merits of the case; but merely to shew that the proceedings in the former suit had been put an end to. It was, therefore, immaterial by what particular mode the rule had been obtained; for it was not used for the purpose of enhancing or adding to the damages, or of influencing or prejudicing the minds of the Jury. The rule does not state any of the circumstances of the former suit, or that the Court had directed the cause to be referred to the Prothonotary, or that he had made his award. If the award had been set out, it might have raised a different question. Although a verdict or judgment in a criminal case cannot be used in a civil suit by the party on whose testimony such verdict was obtained; yet there are several instances where such evidence is admissible, although it may tend to produce an unfavourable impression; for instance, the confession of a prisoner, made voluntarily, is not only evidence against him on his trial, but may also implicate others. So, in civil actions, a party may be bound by his own admissions, which are receivable in evidence against him. If a writ of *fi. fa.*, under which the goods of a party have been seized in execution, be set aside by a rule or order of

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the Court, for irregularity, there can be no doubt that, in an action of trespass against the Sheriff for an illegal seizure under the writ, the rule to set it aside may be produced in evidence, although it was obtained on the affidavit of the party against whom the writ was sued out. Here, however, the rule was merely produced to shew that the former suit was determined, which it was incumbent on the plaintiff to prove, in order to sustain the allegation in her declaration.

Rule discharged.

Friday,
 Nov. 25th.

STRONG v. HARVEY.

A policy of assurance, underwritten by a company of several ship-owners, who "did severally and respectively, but not jointly or in partnership, or the one for the other of them, but each only in his own name, and on his own account, mutually agree to insure each other's ships for one year, is not illegal under the statute 6 Geo. 1, c. 18.

THIS was an action of *assumpsit* on a policy of assurance. The declaration stated, that the plaintiff, before, and at, and after the time of making the policy of assurance therein-after mentioned, to wit, on the 15th *February*, 1822, and from thence continually until the 15th *February*, 1823, was a ship owner, and member, together with the defendant and divers other persons, of a certain society or association, called the *Pacific Association*; and that the ship or vessel therein-after mentioned, was, before and at the day of the date and making of the policy, to wit, on the said 15th *February*, 1822, admitted into and entered in the said society; that the plaintiff, theretofore, to wit, on the 7th *March*, 1822, caused to be made a certain

By a regulation of an assurance company, which was indorsed on and made part of the policy, it was provided "that, in case of loss or average, the same should be paid for at two months from adjustment." The plaintiff in his declaration alleged that he was always ready and willing to adjust, but that the defendant and the committee refused to do so:—*Held*, that the adjustment was not a condition precedent; but that the plaintiff was entitled to recover on proof that he applied for the adjustment.

A tender must be unconditional and of the precise sum due. Therefore, where a plaintiff had separate demands for various sums of unequal amount against several persons, an offer of an aggregate sum in discharge of the debts of all, will not support a plea alleging the tender of a fractional part for the debt of one.

policy of assurance, purporting thereby and containing therein that the plaintiff, as well in his own name, as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain, in part or in all, did make assurance, and cause himself, themselves, and every of them, to be insured, lost or not lost, at and from any port or ports, place or places, not excepted in that policy, or the rules of the *Pacific Association*, upon the body, tackle, &c., of the ship *Waterloo*, beginning the adventure on the ship from the 15th *February*, 1822, to the 15th *February*, 1823, for 1500*l.*, against all perils and losses; the assurers agreeing to contribute each one according to the rate and quantity of his sum therein assured, and confessing themselves paid the consideration due to them for that assurance by the assured, at and after the rate of twelve guineas *per cent. per annum*. The plaintiff then averred, that the rules and regulations of the *Pacific Association* mentioned in and referred to by the policy, and an indorsement thereon, were as follow:—*First*, “that Messrs. *Thomas Jackson, John Philips, S. F. Somes, David Hewson, Samuel Bryan, Richard Harvey, and Benjamin Barrett*, be appointed a committee for settling averages and managing the affairs of the association for the then present year, who should be precluded from accepting the like office in any other assurance society of the same nature.” Several other rules or regulations were then set out, amounting, in the whole, to twenty-four; the *third* of which was, “that, before any ship should be insured, there should be paid five shillings *per cent* on the sum insured, towards defraying the necessary expenses, and there should also be paid the charge for the policy and power of attorney, and two guineas for survey;”—*Eighth*, “that no sails cut away or lost (save and except those going with the masts), nor cables washed from the decks, should be allowed under average;”—*Fourteenth*, “that, in case of loss or average, the same should be paid for at two months from adjustment;”—*Lastly*, “that the several

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ship-owners whose names were there-under written, did severally and respectively, but not jointly or in partnership, or the one for the other of them, but each of them only in his own name, and on his own account, thereby mutually agree to insure each other's ships, from twelve o'clock at noon of the day of entry of each vessel into that association, until twelve o'clock at noon of the 15th *February*, 1823; and that the foregoing rules were and always should be considered as binding upon all the members, as if inserted in and made a component part of the policies." The plaintiff then averred, that the policy of assurance, with the said memorandum and indorsement, was so made by him for and on the part and behalf of himself; that the assurance so made was made for the sole use and benefit of himself; and that the said writing or policy of assurance was subscribed with the name of the defendant and divers other persons, by an agent of the said several persons, as assurers for the sum of 1500*l.*, upon the premises in the policy of assurance mentioned; that thereupon, in consideration of the premises, and that the plaintiff had paid five shillings *per cent.* on the said sum of 1500*l.* towards defraying the necessary expenses, and also the charges due according to the *third* rule or regulation above mentioned; and that the plaintiff, at the special instance and request of the defendant, had undertaken, and faithfully promised the defendant, to perform and fulfil all things in the said policy of assurance, memorandum, and rules and regulations contained, on his part and behalf to be done, performed, and fulfilled, the defendant undertook, and promised the plaintiff, that he would become and be an assurer to the plaintiff for his part and proportion of the said sum of 1500*l.*, of and upon the said ship or vessel, upon the terms, and according to the policy of assurance, memorandum, and rules and regulations, and would perform and fulfil all things in the said policy of assurance, memorandum, and rules and regulations contained, on his part and behalf to be performed and ful-

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filled; and that the said ship or vessel was, from the day of the date of the same policy of assurance, to wit, on the said 15th *February*, 1822, admitted into and entered in the said society or association. The plaintiff then averred, that he was interested to the extent of the sum insured, and that the ship, by the mere perils and dangers of the seas, and by stormy and tempestuous weather, and the violence of the winds and waves, was stranded, strained, bulged, broken, damaged, and lessened in value; and thereby the plaintiff was obliged to lay out a large sum of money, to wit, 1000*l.*, in repairing the damage and injury so done, to cast and throw goods overboard, and to be piloted, conducted, and assisted, into the port of *Savannah*, by part of the crew of another vessel; by reason whereof, general average losses became chargeable, the proportion whereof payable by the defendant amounted to a large sum, to wit, 1000*l.* The plaintiff then averred, that, from the time of the loss, he had always been willing that such losses or damage should be adjusted according to the rules of the Association, of which the defendant had notice; and that the plaintiff had requested the defendant and the committee for managing the affairs of the society, to settle or adjust the losses and damage; but that they refused to do so, although a reasonable time for that purpose had long since elapsed, and that the space of two months had elapsed since the time when the adjustment ought to have been made: by means of which said several premises, the defendant became and was liable to pay to the plaintiff the sum of 300*l.*, being his proportion of the said sum of 1500*l.*, according to the true intent and meaning of the policy, and his said promise and undertaking so by him made in manner and form aforesaid.

There were three other counts, in which the terms of the policy and statement of the loss were varied. To these were added the common money counts.

The defendant pleaded, that, as to the alleged supposed

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necessity of piloting, conducting, and assisting, the said ship *Waterloo* into the port of *Savannah*, by part of the crew of a certain other ship, and as to the residue of the demands in the declaration, except as to the sum of 3*l.* 2*s.* 9*d.*, he did not undertake or promise in manner and form as the plaintiff had complained against him;—and, as to the said sum of 3*l.* 2*s.* 9*d.*, he pleaded a tender, which was negatived by the plaintiff in his replication; whereupon issue was joined.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last Term, it appeared that the plaintiff and defendant were ship-owners, and members of the *Pacific Association*, and that they had mutually agreed to insure each other's ships, according to the last regulation indorsed on the policy, and set out by the plaintiff in his declaration; that the ship *Waterloo*, of which the plaintiff was owner, had run upon the *Tortugas* shoals on the coast of *Florida*, in the course of her homeward voyage from *Jamaica* to *London*, within the period for which the assurance was effected, *viz.* previously to the 15th *February*, 1823; and that she sustained a considerable injury; that, after throwing part of her cargo overboard, she was got off the shoals in the afternoon of the day in which she ran upon them, through the assistance of the crew of a privateer sailing under *Colombian* colours, who acted under the direction of some pilots, termed wreckers, from *New Providence*; to each of whom the plaintiff, who was on board the *Waterloo*, gave a portion of the cargo, by way of remuneration for their services. But instead of proceeding to *Havannah*, which was the nearest port, or to *New Providence*, the plaintiff took the lieutenant and six of the crew of the privateer into the *Waterloo*, and sailed to the *Savannah*, a port in the *United States*, of which country the lieutenant of the privateer was a native. The lieutenant, on his arrival, instituted a suit in the *Admiralty Court* at *Savannah*, for salvage,

when 12,000 dollars were awarded to the privateer for her services, although the whole of the cargo on board the *Waterloo*, at the time of the accident, was worth, or had cost, only 24,000 dollars. On the plaintiff's return to this country, the members of the *Pacific Association*, suspecting that he had been guilty of fraud or connivance with the lieutenant of the privateer in the proceedings at the *Savannah*, required him to attend before a committee; and, on his attendance, he was asked how he became possessed of a sum exceeding 5,000 dollars, with which he himself had purchased at *Savannah* a considerable part of the cargo which had been sold to satisfy the decree for salvage; and, on his declining to answer that question to the satisfaction of the committee, they refused to adjust or settle the average, although he demanded an adjustment. He then commenced different actions on the policies, in which he sought to recover the above sum of 1500*l*. The members of the Association, through their agent, offered to pay the plaintiff 400*l*. 11*s*. 1*d*. in full of his demand; and, on the agent being called as a witness to prove that fact, he deposed, that, on the 7th *August*, 1823, he offered the plaintiff to pay him that sum, and said, that it was in full of his demand for the proportions to which the several subscribers to the policy were liable; that he produced the statement of the proportions to the plaintiff; and that in it was contained the sum of 3*l*. 2*s*. 9*d*., being the amount for which the defendant was liable; that the plaintiff began reading the statement, but left the witness abruptly before he could inform the plaintiff what part of the money was inserted therein on account of the defendant; that he, the witness, on the same day, went to the office of the plaintiff's attornies; that he saw one of them, and tendered him the same sum of 400*l*. 11*s*. 1*d*., and told him that it was in full of the plaintiff's demand for the proportions to which the subscribers to the policy were liable; that he read over to him the statement containing the several proportions, but that

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the plaintiff's attorney declined receiving the amount tendered; that the witness then saw the other of the plaintiff's attornies, and made the like offer to him, but that he also declined to receive the above sum, saying, that it was too small, and that much more was due; when the witness told him that 3*l.* 2*s.* 9*d.* was on the defendant's account. On the witness being asked if he had tendered the latter sum to either of the parties, he said that he did not, as he had nothing less than a 10*l.* note with him at the time. The Jury found a verdict for the plaintiff, and stated that they thought that he had been guilty of no misconduct in going to *Savannah*, but that all he did there was fraudulent, thereby negating that part of his claim in which he sought to recover under the decree for salvage; and it was agreed to refer it to an arbitrator to determine whether the above sum of 400*l.* 11*s.* 1*d.* tendered to the plaintiff, was sufficient to pay the amount of the particular and general average loss, independently of the salvage.

Mr. Serjeant *Vaughan*, on a former day in this Term, obtained a rule *nisi* that this verdict might be set aside, and a nonsuit entered, or a verdict entered for the defendant, or that the judgment might be arrested, on the grounds,—*first*, that the tender proved to have been made by the agent of the association to the plaintiff and his attornies, was sufficient to support the plea;—*secondly*, that the policy was illegal and void under the statute 6 *Geo.* 1, c. 18;—and, *lastly*, that the declaration was insufficient, and could not be supported, as the adjustment of the loss by the committee was in the nature of a condition precedent, which ought to have been alleged, or at all events to have been proved, before the plaintiff could be entitled to recover under the fourteenth regulation, which was indorsed on the policy, and set out in the declaration.

Mr. Serjeant *Taddy* now shewed cause.—There is no ground whatever for saying that the policy is illegal or

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against the statute 6 Geo. 1, as each subscriber or member of the association is individually and severally liable to the amount of his subscription; nor can the association be considered as a partnership, as there is no provision in the policy to render all the members liable in case of the insolvency of one; neither is there any joint-stock, or interest, or profit and loss, to be divided among the members.—The adjustment by the committee was not a condition precedent which the plaintiff ought to have alleged in his declaration; nor was he bound to prove it. He averred, that, although he was ready and willing to adjust, according to the rules of the association, and requested the defendant so to do, yet that both he and the committee refused; and, whether they did or not, was a question of fact for the Jury. Besides, by the fourteenth regulation on the policy, the loss or average was to be paid for in two months from adjustment; and the plaintiff alleged that the defendant refused to adjust, although the two months had elapsed. In *Hotham v. The East India Company* (a), a covenant in a charter-party, “that no claim should be admitted, or allowance made, for short tonnage, unless such short tonnage should be found and made to appear on the ship’s arrival, on a survey to be taken by four ship-wrights to be indifferently chosen by both parties,” was held not to be a condition precedent to the plaintiff’s right of recovering for short tonnage; but a matter of defence to be taken advantage of by the defendants; and the not averring the performance in the declaration, was held to be no ground for arresting the judgment; for, that, if a defendant prevent the performance of a condition precedent by his neglect and default, it is equal to performance by the plaintiff. So, here, as the defendant refused to adjust, after having been requested by the plaintiff to do so, it was equal to performance on the part of the latter.

(a) 1 Term Rep. 638; S. C. 1 Doug. 272.

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Mr. Serjeant *Vaughan*, and Mr. Serjeant *Wilde*, in support of the rule.—As the agent to the association proved that he offered the plaintiff and his attorneys a certain sum in full of his demand, and told one of the latter that it included the defendant's contribution to the insurance, amounting to 3*l.* 2*s.* 9*d.*, it was sufficient to support the plea; particularly as the attorney did not object to the tender on the ground that the money was not produced, but merely said that it was not sufficient.—It may be admitted that the policy is not illegal or void under the statute 6 *Geo.* 1, c. 18. In *Dowell v. Moon* (a), a policy by a club of mutual under-writers, where the members were not responsible for the solvency of each other, was held to be valid, although the sums which they respectively insured were not specified on the face of the policy. There, the regulation was in terms precisely similar to the last rule indorsed on this policy; and Lord Chief Justice *Gibbs* said: "The members of the association cautiously guard against any joint liability. According to the terms of their agreement, [if, when a loss happens, any of the members are insolvent, the owner of the ship which is lost has no claim for their share of the contribution upon the other parties to the policy."—But with respect to the adjustment by the committee, it was clearly a condition precedent, as the chief object the members of the association had in view, was, to avoid expenses which might arise in the settlement of losses; and the mere allegation that the plaintiff requested the committee to adjust, is not a sufficient performance of the condition on his part. The committee were to make the adjustment, and not the defendant; and the plaintiff has merely averred that *they* refused to do so. He should have laid all the circumstances attending the loss before them, in order to enable them to come to an adjustment. In *Worsley v.*

(a) 4 Camp. 166.

Wood(a), by the proposals of an insurance company against fire, it was stipulated, that persons insured should give notice of a loss forthwith, and deliver in an account, and procure a certificate of the minister and churchwardens, importing that they knew the character, &c., of the insured;—and it was held, that the procuring such a certificate was a condition precedent to the right of the assured to recover, and that it was immaterial that the minister and churchwardens wrongfully refused to sign the certificate. In the case of a condition precedent, however, improbable the thing may be, it must be complied with, or the right which was to attach on its being performed does not vest. Here, the main object of the members of the association was, that losses should be adjusted, and the amounts paid within a certain period after adjustment; and, as no such adjustment ever took place, the plaintiff was not in a situation to sue the defendant on the policy.

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Lord Chief Justice BAST.—Several objections have been raised against the plaintiff's right to recover in this action. It was at first insisted that the policy was void, as being in contravention of the statute 6 Geo. 1, c. 18, which was passed to secure certain powers and privileges to two chartered companies, viz. the *Royal Exchange* and the *London Assurance Companies*, for the assurance of ships and merchandizes at sea, and to render void all policies of other societies, co-partners, or persons insuring as partners. But that statute permitted private persons to assure and under-write policies as they were accustomed to do before the act was passed (b). Here, the assured, and all the under-writers named in the policy, are members of a society or association for the insurance of each others' ships, and each member is individually re-

(a) 6 Term Rep. 710 (in error); S. C. 2 H. Bl. 574.

(b) Sect. 12.

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sponsible for any loss that may happen to the assured, according to the terms of his separate contract; for, by the last regulation, it is expressly provided "that the several ship-owners whose names were thereunder written, did *severally* and respectively, *but not jointly* or in partnership, or the one for the other of them, but each of them only in his own name, and on his own account, thereby mutually agree to insure each other's ships for one year, and that the rule should be considered as binding upon all the members, as if inserted in and made a component part of the policies." As, therefore, each member is only liable to the extent of his subscription, the association does not constitute a partnership; and, as there was no joint contract, it does not fall within the meaning or operation of the statute. The great advantage to be derived from insuring in such a society, is, that, instead of trusting to general under-writers, the members rely on the responsibility of each other, for none are admitted but those who have ships of their own, which therefore stand as a security for any losses to which the parties may be liable. In order to render the policy void within the meaning of the statute, it must be shewn that each one of the members undertakes for the solvency of the rest. But that is not so, for each is only liable according to his own proportion; and what he under-writes is for his own benefit, and on his own ship. The members have most cautiously guarded against any *joint* liability. I am extremely happy to be enabled to come to the conclusion, that there is no illegality in this case, as associations of this description are extremely useful, and tend to prevent litigation. Members of such societies are not induced to take such technical objections as general under-writers are frequently in the habit of doing; besides, they can detect frauds in the assured with greater facility, and will not set up dishonourable defences, in contravention of law, and of fair and *bond fide* claimants.

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It has been insisted in this case, that the tender made to the plaintiff and his attorneys was sufficient to support the defendant's plea, and was consequently a bar to this action; but I am of opinion that it was not a good tender, as it was offered in full for the plaintiff's demand on all the members, and was not confined to that on the defendant alone. At all events, such an offer was merely conditional, which prevents it from operating as a legal tender. The witness who was called to prove it, stated that he offered the plaintiff 400*l.* 11*s.* 1*d.* in full of his claims for the proportions to which the several subscribers to the policy were liable; and that the plaintiff left the witness abruptly, and before he had an opportunity of informing him what part of that sum was offered on the defendant's account. According to several decided cases, a tender must be unconditional; and a tender of a larger sum than that actually due, is not a valid tender. So, an offer to pay a sum to be accepted as the whole balance due, where a larger sum is claimed, does not amount to a good tender (a); and here, the agent of the members of the association merely offered the plaintiff a sum in gross in full for his entire claim; and although he afterwards went to the plaintiff's attorneys and offered a like sum, and informed one of them that 3*l.* 2*s.* 9*d.* was tendered on account of the defendant, yet, as he did not make an actual tender of that sum, and was not prepared to do so, as he said that a bank-note for 10*l.* was the smallest sum he had about him, his evidence was not sufficient to support the defendant's plea; for, where one party has separate demands for various sums of unequal amount against several, an offer of an aggregate sum in payment for the debts of all, will not support a plea alleging that a fractional part was tendered for the debt of one.

Another objection has been raised to the plaintiff's

(a) *Evans v. Judkins*, 4 Camp. 156.

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right to recover, on the ground that the loss has not been adjusted according to the fourteenth regulation indorsed on the back of the policy; that it was in the nature of a condition precedent, and should therefore have been alleged to have been made on the face of the declaration; also that it was incumbent on the plaintiff to shew that he had furnished the committee with the materials necessary to enable them to make a proper adjustment. But the plaintiff proved that he applied for an adjustment, and he alleged that he was always ready and willing to adjust, but that the defendant and the committee refused to do so. The evidence adduced was sufficient to sustain that allegation. The defendant offered no reason or excuse for not making the adjustment, which was clearly necessary, as the Jury found that there was nothing fraudulent in the plaintiff's conduct until after the ship was carried into *Savannah*. He had a claim for average before his arrival there, which ought to have been adjusted and paid. The amount of that claim has been referred to an arbitrator; and, as the verdict for the plaintiff negatives the plea of tender, I think it ought not to be disturbed.

Mr. Justice PARK. —I am of the same opinion. I at first thought that the policy was void, and fell within the operation of the statute 6 Geo. 1; but I am now fully convinced that there is no reason for the objection that has been raised on that ground. Although in *Lees v. Smith (a)*, where a company of ship-owners had engaged to insure each other's ships, and had covenanted *severally*, and not *jointly*, to pay a certain sum in case of loss, in proportion to their respective shares; yet, as there was a clause providing that, in case of the insolvency of any one of the members, all the others were to be responsible, it was held that the contract was void by the statute; but in

(a) 7 Term Rep. 338.

Harrison v. Millar (a), where each individual subscriber was only liable for the sum to which his name appeared, and not for the default of the other subscribers, Lord *Kenyon* ruled that such a company or association did not infringe on the statute. So, here, by the last regulation indorsed on the policy, the several subscribers thereto did severally and respectively, but not jointly, nor the one for the other of them, but each of them only on his own account, agree to insure. This case, therefore, falls within the principle laid down by Lord *Kenyon* in *Harrison v. Millar*, viz. that, as the association undertook in their individual characters only, and in such characters have under-written the policy, they consequently stand in this respect as individual under-writers.

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With respect to the objection that has been made as to the sufficiency of the tender, I am sorry to say it must avail, as no legal tender was proved to have been made to the plaintiff on behalf of the defendant. In reason and justice it might amount to a good tender; but it is impossible for us to over-rule the numerous decisions on the point. This was clearly a conditional tender, as a certain sum was offered to the plaintiff in full for all his claims or demands on the policy, and no sum was actually tendered either to him or to his attornies.

Mr. Justice BURROUGH.—I at first suspected that this association might be considered as a partnership; but I am now fully convinced that it cannot. An association or society of members of this description is highly beneficial. There is no joint profit or loss to be divided among the partners, and without that a partnership cannot be constituted. With respect to the tender, I am quite clear that it cannot be supported, as it has been long since established, that, in order to make a tender legal, it must be

(a) Id. 340; 2 Esp. N. P. C. 513.

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unconditional; whereas here, the tender was proved to have been conditional.

Mr. Justice GASELEE.—The plea is singularly drawn, and I much doubt whether it would not have been bad on demurrer, as the plaintiff had other demands than for the piloting and assisting the ship into the port of *Savannah*; for she had sustained considerable injury before she arrived there. It is, however, immaterial to consider whether the plea be good or not in this respect, as the defendant has alleged that he tendered the plaintiff 3*l.* 2*s.* 9*d.*; and it was proved that a sum of 400*l.* 11*s.* 1*d.* only was offered in full of all the plaintiff's claim or demand on the whole policy. That tender was conditional, and cannot be supported in law. It is, therefore, unnecessary to touch on either of the other objections. A verdict must be entered for the plaintiff, with nominal damages, on the plea of tender, the Jury having negatived it; and this rule must be—

Discharged.

Friday,
 Nov. 25th.

STRONG v. RULE.

In an action on a policy of assurance by a society of mutual underwriters, on the back of which policy were indorsed the rules and regulations of the society, which formed the *entire* consideration for the assurance, and were declared (by the last of them) to be as binding on the parties as if made a component part of the policy; the plaintiff, in his declaration, omitted to set out the regulations, and the evidence adduced at the trial only tended to establish a contract founded on them:—*Held*, that the declaration was insufficient, and not supported by the evidence.

THIS was an action against another under-writer, on the same policy as in the preceding case of *Strong v. Harvey*. The defendant pleaded the general issue.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last *Easter* Term, the plaintiff adduced evidence in support of the *second* count of the declaration only, in which the rules or regulations of the association, indorsed on the back of the policy, were not set out; when it was submitted for the defend-

ant, that the contract on which the action was founded was not properly stated, and that the plaintiff could only be permitted to give evidence applicable to those regulations which formed the most material part of the policy, and without which the action could not be maintained. His Lordship was inclined to think that the objection was well founded. A verdict was, however, taken for the plaintiff on the second count, leave being reserved to the defendant to move that it might be set aside, and a non-suit entered, in case the Court should be of opinion that it was necessary that the regulations should have been set out in that count.

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Mr. Serjeant *Vaughan*, in the last Term, accordingly obtained a rule *nisi*, and submitted, that, as the regulations were declared by the association to be considered as binding on the members as if made a component part of the policy, they were, in fact, the essence of the contract under which the insurance was effected, and to the supporting of which the evidence should have been confined.

Mr. Serjeant *Taddy* now shewed cause.—Although the second count might have been bad on demurrer, it is sufficient after verdict. It states that the plaintiff caused an insurance to be made on the ship *Waterloo*, at and from all ports and places not excepted by the rules of the association. The rules and regulations, therefore, were receivable in evidence, as they were expressly referred to; and the ports excepted could only be ascertained by their production. In *Clarke v. Gray*, Lord *Ellenborough* said (a): “It is sufficient to state in a declaration so much of any contract, consisting of several distinct parts and collateral provisions, as contains the entire consideration for the act, and the entire act which is to be done in virtue of such con-

(a) 6 East, 569.

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sideration; and that the rest of the contract, which only respects the liquidation of damages after a right to them has accrued by a breach of the contract, is matter proper to be given in evidence to the Jury in reduction of damages, but not necessary to be shewn to the Court, in the first instance, on the face of the record." It is here stated, that the assurers confessed themselves paid the consideration due to them for the assurance, by the assured, at and after the rate of twelve guineas *per cent. per annum*. That was the entire consideration for the assurance; and although in *Latham v. Ratley* (a), where the declaration stated that the defendant undertook to carry goods from *London*, and deliver them safely at *Dover*; and the contract proved was, to carry and deliver safely, fire and robbery excepted, it was held to be a fatal variance, as the exception was not stated in the declaration; yet, here, the regulations indorsed on the policy are not in the nature of exceptions; nor was the adjustment, as was decided in the last case, a condition precedent; neither did the rules operate in bar of the action, or discharge the liability of the defendant under the policy.

Mr. Serjeant *Vaughan* and Mr. Serjeant *Wilde*, in support of the rule, were stopped by the Court.

Lord Chief Justice BEST. — The evidence adduced by the plaintiff at the trial, applied only to the second count of the declaration, in which all the regulations indorsed on the back of the policy were wholly omitted. I am therefore of opinion, that, as they formed a most material part of the contract, and were not proved, the plaintiff was not entitled to recover on that count. I fully accede to the doctrine laid down by Lord *Ellenborough* in *Clarke v. Gray*, *viz.* that, in declaring on a contract, it is only neces-

(a) 2 Barn. & Cress. 20.

sary to set out so much of it as contains the entire consideration for the act, and the entire act to be done in virtue of such consideration. But the *entire* consideration, on which alone an action can be supported, must be set out correctly. Although the regulations were referred to in the declaration, yet they must be considered as forming part of the policy itself; for, by the last of them, it was provided, that the rules should be considered as binding upon all the members as if they were inserted in and made a component part of the policy. In the declaration it is stated, that the assurers confessed themselves paid the consideration due to them for the assurance, by the assured, at and after the rate of twelve guineas *per cent. per annum*; and, although that corresponds with the body of the policy, yet the rules or regulations indorsed on the back of that instrument explain the intention of the members of the association, and shew that the sum of twelve guineas was not an actual payment in money, as would be inferred from the declaration, but an assurance to that amount by the plaintiff on the ships of the subscribers to his policy; or, in other terms, that the several members each agreed to insure each other's ships to the amount stated in the policy. That varies the consideration, and ought to have been stated in the declaration. Besides, the third rule qualifies the consideration as to the sum actually paid, as it directs, that, before any ship should be insured, there should be paid 5*s. per cent.* on the insurance, towards defraying the necessary expenses, and also the charge for the policy. So, by the last regulation, the members agreed to insure each other's ships for a year; but that fact is not stated truly on the face of the declaration, although it forms the essential part of the consideration for the assurance, and materially alters the situation of the parties. As, therefore, the payment of the consideration was not in money, the statement in the declaration was not borne out by the evidence. I am, there-

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fore, of opinion that the rule for a nonsuit must be made absolute.

Mr. Justice PARK.—I am of the same opinion. It appears to me that there was a total failure in the proof as to the terms of the payment of the premium as alleged in the declaration. This policy differs most materially from the old form, which was founded on custom and long usage. It was the express object of the members of the *Pacific Association* to insure each other's ships so as to evade the provisions of the statute 6 Geo. 1, c. 18. The assured did not agree to pay the assurers the sum of twelve guineas *per cent. per annum*, as stated in the declaration; nor did the evidence at the trial go to support that fact in the smallest degree.

Mr. Justice BURROUGH concurred.

Mr. Justice GASELEE.—It appears to me to be unnecessary to enter into the question whether the regulations should have been set out in the second count of the declaration or not, as there was a fatal variance between the consideration therein stated, and that proved at the trial. On that ground alone, therefore, I am of opinion that the plaintiff was not entitled to recover.

Rule absolute for a nonsuit.

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Saturday,
Nov. 25th.

HOMER v. ASHFORD and AINSWORTH.

THIS was an action of covenant. The declaration stated—That, before the making of the indenture thereafter mentioned, to wit, on the 20th *March*, 1822, the defendant *Joseph Ashford* had hired himself to the plaintiff for a certain term, determinable in a manner then agreed upon by them the plaintiff and *Joseph Ashford*, in the capacities of clerk, book-keeper, and traveller, in the trade of a sadlers' ironmonger, then carried on by the plaintiff; and that the said *Joseph Ashford* had agreed with the plaintiff not to work for, or be employed by, any other person during the said term, without the licence and consent of the plaintiff in writing, under his hand, for that purpose first had and obtained; that the said *Joseph Ashford* afterwards, and whilst the said term was still undetermined and unexpired, to wit, on &c., was desirous of entering into partnership, in the same trade of a sadlers' ironmonger, with the defendant *James Marsh Ainsworth*, but was prevented therefrom by reason of the said term being still undetermined and unexpired; and thereupon, afterwards, to wit, on &c., by a certain indenture, made between the plaintiff of the one part, and the defendants of the other part (one part of which indenture, sealed with the seals of the defendants, the plaintiff brought into Court, the date whereof is the day and year aforesaid)—reciting (amongst other things), that, in pursuance of a proposal to that effect made by the defendants, and assented to by the plaintiff, the defendants, for the considerations therein mentioned, did thereby, for themselves, jointly and severally, and for their joint and several heirs, executors, and administrators, covenant and agree with the plaintiff, his executors, administrators, and assigns, that the said defendants, or either of them, their or either of their traveller or travellers, or any other person or persons on their or

A covenant to restrain a person from exercising a trade is not illegal, if it be not to the general prejudice of the public, and the consideration be reasonable.

In covenant, the plaintiff in his declaration (after *proferet*) averred, that the defendants, for the considerations in the deed contained, covenanted that they would not do certain acts. The defendants pleaded, that, as the performance of the covenants in the indenture mentioned, would, for a term, prevent them from carrying on their trade, they were in restraint of trade, and illegal:—*Held*, that, as the defendants had not cravedoyer of the deed, nor demurred to the declaration on account of any supposed insufficiency of consideration in the deed, as set out therein, the Court would (the covenants being reasonable) presume that the deed disclosed a sufficient legal consideration.

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either of their behalf, should not nor would, on any account or pretence whatsoever, enter into, or pass through, to solicit or take orders, the towns mentioned in the schedule B. thereunder written, or any of them, in taking the first *North* and *West* journey, within *forty-two* days of the several days set opposite the said towns respectively in schedule B., at which the plaintiff presumed that he, by himself or his traveller or travellers, should enter or should leave the said towns in the said schedule respectively mentioned; and also that the defendants, or either of them, their or either of their traveller or travellers, or any person or persons on their or either of their behalf, should not nor would, during the term of *fourteen* years from the day of the date of the deed, on any account or pretence whatsoever, enter into or pass through, to solicit or take orders, the towns mentioned in the schedules A. and B., after their said first *North* and *West* journey as aforesaid, nor the towns mentioned in schedule C. thereunder written, within *fifty-six* days of the several days set opposite the towns respectively in the said several schedules mentioned, at which the plaintiff presumed that he, by himself or his traveller or travellers, should enter or should leave the said towns respectively in the said several schedules A., B., and C., mentioned, without the licence or consent in writing of the plaintiff, his executors, or administrators, for that purpose first had and obtained; and that, in case the said defendants, or either of them, their or either of their traveller or travellers, or other person or persons on their or either of their behalf, should and did enter into, and pass through, to solicit or take orders, the said towns mentioned in the said schedule B., or any of them, respectively, in taking their said first *North* and *West* journey, within *forty-two* days, and the towns mentioned in schedules A. and B. after their first *North* and *West* journeys as aforesaid, and the towns in schedule C., within *fifty-six* days, of the several days set opposite the said

towns respectively in the said several schedules, during the term of *fourteen* years from the day of the date of the deed, without the licence and consent, in writing, of the plaintiff, his executors or administrators, for that purpose first had and obtained, then that the defendants or one of them, their or one of their executors or administrators, should and would, immediately after entering the said towns in the said several schedules mentioned, or any or either of them, within the times aforesaid, well and truly pay or cause to be paid unto the plaintiff, his executors, administrators, or assigns, the full and just sum of 50*l.* of lawful money of *Great Britain*, as and in the nature of stipulated damages, for every order which they, or he, or their or either of their traveller or travellers, or other person or persons on their or either of their behalf, should solicit or take for the sale of any goods, wares, or merchandizes, in any and every of the said towns which they or he, or such traveller or travellers, or other person or persons, should so enter. The plaintiff then averred, that the schedule B. mentioned and referred to in the said indenture, related to the *West* journey therein mentioned, and that, amongst other towns, the town of *Cheltenham*, in the county of *Gloucester*, was and is mentioned in the said schedule, and that the days set opposite to that town in the same schedule, at the time of making the said indenture, were the 3d of *January* and the 27th of *June*, and also the 22d of *February* and the 15th of *August*; and that, after the making of the indenture, to wit, on the 20th of *February*, 1824, the defendant *Ashford* took the first *West* journey in the indenture mentioned; and in that journey did, to wit, on that day (the same being within forty-two days of one of the said days, to wit, the 22d of *February*, so set opposite the said town of *Cheltenham* in schedule B. as aforesaid) enter into the said town of *Cheltenham* to solicit orders therein for the sale of goods in the way of their, the defendants', trade and business of saddlers' ironmongers, being the said orders

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right to recover, on the ground that the loss has not been adjusted according to the fourteenth regulation indorsed on the back of the policy; that it was in the nature of a condition precedent, and should therefore have been alleged to have been made on the face of the declaration; also that it was incumbent on the plaintiff to shew that he had furnished the committee with the materials necessary to enable them to make a proper adjustment. But the plaintiff proved that he applied for an adjustment, and he alleged that he was always ready and willing to adjust, but that the defendant and the committee refused to do so. The evidence adduced was sufficient to sustain that allegation. The defendant offered no reason or excuse for not making the adjustment, which was clearly necessary, as the Jury found that there was nothing fraudulent in the plaintiff's conduct until after the ship was carried into *Savannah*. He had a claim for average before his arrival there, which ought to have been adjusted and paid. The amount of that claim has been referred to an arbitrator; and, as the verdict for the plaintiff negatives the plea of tender, I think it ought not to be disturbed.

Mr. Justice PARK. — I am of the same opinion. I at first thought that the policy was void, and fell within the operation of the statute 6 *Geo.* 1; but I am now fully convinced that there is no reason for the objection that has been raised on that ground. Although in *Lees v. Smith (a)*, where a company of ship-owners had engaged to insure each other's ships, and had covenanted *severally*, and not *jointly*, to pay a certain sum in case of loss, in proportion to their respective shares; yet, as there was a clause providing that, in case of the insolvency of any one of the members, all the others were to be responsible, it was held that the contract was void by the statute; but in

(a) 7 Term Rep. 338.

Harrison v. Millar (a), where each individual subscriber was only liable for the sum to which his name appeared, and not for the default of the other subscribers, Lord *Kenyon* ruled that such a company or association did not infringe on the statute. So, here, by the last regulation indorsed on the policy, the several subscribers thereto did severally and respectively, but not jointly, nor the one for the other of them, but each of them only on his own account, agree to insure. This case, therefore, falls within the principle laid down by Lord *Kenyon* in *Harrison v. Millar*, viz. that, as the association undertook in their individual characters only, and in such characters have under-written the policy, they consequently stand in this respect as individual under-writers.

With respect to the objection that has been made as to the sufficiency of the tender, I am sorry to say it must avail, as no legal tender was proved to have been made to the plaintiff on behalf of the defendant. In reason and justice it might amount to a good tender; but it is impossible for us to over-rule the numerous decisions on the point. This was clearly a conditional tender, as a certain sum was offered to the plaintiff in full for all his claims or demands on the policy, and no sum was actually tendered either to him or to his attornies.

Mr. Justice BURROUGH.—I at first suspected that this association might be considered as a partnership; but I am now fully convinced that it cannot. An association or society of members of this description is highly beneficial. There is no joint profit or loss to be divided among the partners, and without that a partnership cannot be constituted. With respect to the tender, I am quite clear that it cannot be supported, as it has been long since established, that, in order to make a tender legal, it must be

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(a) Id. 340; 2 Esp. N. P. C. 513.

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unconditional; whereas here, the tender was proved to have been conditional.

Mr. Justice GASELEE.—The plea is singularly drawn, and I much doubt whether it would not have been bad on demurrer, as the plaintiff had other demands than for the piloting and assisting the ship into the port of *Savannah*; for she had sustained considerable injury before she arrived there. It is, however, immaterial to consider whether the plea be good or not in this respect, as the defendant has alleged that he tendered the plaintiff 3*l.* 2*s.* 9*d.*; and it was proved that a sum of 400*l.* 11*s.* 1*d.* only was offered in full of all the plaintiff's claim or demand on the whole policy. That tender was conditional, and cannot be supported in law. It is, therefore, unnecessary to touch on either of the other objections. A verdict must be entered for the plaintiff, with nominal damages, on the plea of tender, the Jury having negatived it; and this rule must be—

Discharged.

Friday,
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STRONG v. RULE.

In an action on a policy of assurance by a society of mutual under-writers, on the back of which policy were indorsed the rules and regulations of the society, which formed the *entire* consideration for the assurance, and were declared (by the last of them) to be as binding on the parties as if made a component part of the policy; the plaintiff, in his declaration, omitted to set out the regulations, and the evidence adduced at the trial only tended to establish a contract founded on them:—*Held*, that the declaration was insufficient, and not supported by the evidence.

THIS was an action against another under-writer, on the same policy as in the preceding case of *Strong v. Harvey*. The defendant pleaded the general issue.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last *Easter* Term, the plaintiff adduced evidence in support of the *second* count of the declaration only, in which the rules or regulations of the association, indorsed on the back of the policy, were not set out; when it was submitted for the defend-

ant, that the contract on which the action was founded was not properly stated, and that the plaintiff could only be permitted to give evidence applicable to those regulations which formed the most material part of the policy, and without which the action could not be maintained. His Lordship was inclined to think that the objection was well founded. A verdict was, however, taken for the plaintiff on the second count, leave being reserved to the defendant to move that it might be set aside, and a nonsuit entered, in case the Court should be of opinion that it was necessary that the regulations should have been set out in that count.

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Mr. Serjeant *Vaughan*, in the last Term, accordingly obtained a rule *nisi*, and submitted, that, as the regulations were declared by the association to be considered as binding on the members as if made a component part of the policy, they were, in fact, the essence of the contract under which the insurance was effected, and to the supporting of which the evidence should have been confined.

Mr. Serjeant *Taddy* now shewed cause.—Although the second count might have been bad on demurrer, it is sufficient after verdict. It states that the plaintiff caused an insurance to be made on the ship *Waterloo*, at and from all ports and places not excepted by the rules of the association. The rules and regulations, therefore, were receivable in evidence, as they were expressly referred to; and the ports excepted could only be ascertained by their production. In *Clarke v. Gray*, Lord *Ellenborough* said (a): “It is sufficient to state in a declaration so much of any contract, consisting of several distinct parts and collateral provisions, as contains the entire consideration for the act, and the entire act which is to be done in virtue of such con-

(a) 6 East, 569.

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sideration; and that the rest of the contract, which only respects the liquidation of damages after a right to them has accrued by a breach of the contract, is matter proper to be given in evidence to the Jury in reduction of damages, but not necessary to be shewn to the Court, in the first instance, on the face of the record." It is here stated, that the assurers confessed themselves paid the consideration due to them for the assurance, by the assured, at and after the rate of twelve guineas *per cent. per annum*. That was the entire consideration for the assurance; and although in *Latham v. Rutley (a)*, where the declaration stated that the defendant undertook to carry goods from *London*, and deliver them safely at *Dover*; and the contract proved was, to carry and deliver safely, fire and robbery excepted, it was held to be a fatal variance, as the exception was not stated in the declaration; yet, here, the regulations indorsed on the policy are not in the nature of exceptions; nor was the adjustment, as was decided in the last case, a condition precedent; neither did the rules operate in bar of the action, or discharge the liability of the defendant under the policy.

Mr. Serjeant *Vaughan* and Mr. Serjeant *Wilde*, in support of the rule, were stopped by the Court.

Lord Chief Justice BEST. — The evidence adduced by the plaintiff at the trial, applied only to the second count of the declaration, in which all the regulations indorsed on the back of the policy were wholly omitted. I am therefore of opinion, that, as they formed a most material part of the contract, and were not proved, the plaintiff was not entitled to recover on that count. I fully accede to the doctrine laid down by Lord *Ellenborough* in *Clarke v. Gray*, *viz.* that, in declaring on a contract, it is only neces-

(a) 2 Barn. & Cress. 20.

sary to set out so much of it as contains the entire consideration for the act, and the entire act to be done in virtue of such consideration. But the *entire* consideration, on which alone an action can be supported, must be set out correctly. Although the regulations were referred to in the declaration, yet they must be considered as forming part of the policy itself; for, by the last of them, it was provided, that the rules should be considered as binding upon all the members as if they were inserted in and made a component part of the policy. In the declaration it is stated, that the assurers confessed themselves paid the consideration due to them for the assurance, by the assured, at and after the rate of twelve guineas *per cent. per annum*; and, although that corresponds with the body of the policy, yet the rules or regulations indorsed on the back of that instrument explain the intention of the members of the association, and shew that the sum of twelve guineas was not an actual payment in money, as would be inferred from the declaration, but an assurance to that amount by the plaintiff on the ships of the subscribers to his policy; or, in other terms, that the several members each agreed to insure each other's ships to the amount stated in the policy. That varies the consideration, and ought to have been stated in the declaration. Besides, the third rule qualifies the consideration as to the sum actually paid, as it directs, that, before any ship should be insured, there should be paid 5*s. per cent.* on the insurance, towards defraying the necessary expenses, and also the charge for the policy. So, by the last regulation, the members agreed to insure each other's ships for a year; but that fact is not stated truly on the face of the declaration, although it forms the essential part of the consideration for the assurance, and materially alters the situation of the parties. As, therefore, the payment of the consideration was not in money, the statement in the declaration was not borne out by the evidence. I am, there-

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Lord Chief Justice BEST, on this day, after reading the declaration, delivered the judgment of the Court as follows:—

The defendants have not cravedoyer of the deed, but have pleaded over; and the plaintiff has demurred specially to their plea, which it has been admitted is bad: but it has been insisted, for the defendants, that the declaration cannot be supported, as it does not shew a sufficient consideration for the restraint imposed on the defendants; and that, even if it did, as it does not appear on that part of the deed which is set out, and on which the declaration is founded, we are not to assume that that instrument was grounded on a legal or adequate consideration. But we are all of opinion, that the consideration stated on the face of the record is quite sufficient to support the deed on which the action is brought. The general principles on which deeds or other instruments in restraint of trade are void, are laid down by Lord Chief Justice *Parker* in *Mitchel v. Reynolds*, where, among others, it is stated, that it tends to a monopoly, and is against the policy of the law; for the law will not permit one person to restrain another from exercising a trade or calling so as to operate to the general prejudice of the community, or the private right or interest of the individual who wishes to profit by it. But it was decided in *Mitchel v. Reynolds*, which has been since recognized as an authority, that, if there be an adequate or apparent reasonable consideration, such a restraint may be imposed. We have no difficulty in saying, that, in this case, there is abundant consideration expressed in the declaration. If an engagement of this description were deemed not to be binding on the parties, no person would venture to take a clerk or servant into his employ or confidence; for, when such servant had acquired the knowledge to be derived from such employment, and had obtained the names of all his master's customers, he might set him-

self up in opposition to his employer; and it is a well-known fact, that few of the principal tradesmen or persons engaged in commerce in *London* travel on their own account, but commonly send clerks or riders to solicit and take orders from their different customers in the country; and here it appears by the declaration, that *Ashford*, one of the defendants, had hired himself to the plaintiff for a certain term, in the capacities of clerk, book-keeper, and traveller, in a certain specified trade then carried on by the plaintiff; and that he had agreed with the plaintiff not to work for or be employed by any other person during the term, without the plaintiff's consent in writing; that *Ashford*, previously to the determination of the term, was desirous of entering into partnership with the other defendant *Ainsworth*, for the purpose of carrying on the same trade in which the plaintiff was engaged; but that he was prevented from so doing by reason of the term of his engagement with the plaintiff being still undetermined; and that the indenture on which the action is founded was then executed between the plaintiff and both the defendants; by which it appears that the plaintiff assented to a proposal made by the defendants to release *Ashford* from his engagement with him the plaintiff, to enable him to enter into partnership with *Ainsworth*: but, as *Ashford* had a knowledge of certain customers who were in the habit of dealing with the plaintiff, it was stipulated by the deed that the defendants should not enter certain towns in which such customers resided, to solicit orders from them, until a certain number of days had expired, within which the plaintiff or his travellers might call on or visit such customers. That appears to us to be a reasonable and sufficient consideration, and such an engagement as a prudent master would require from his servant. The only remaining difficulty, then, is, whether there is a sufficient consideration apparent on the face of the deed, as set out in the declaration, to restrain the defendants from visiting those towns within the days

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and times therein limited, or whether it was incumbent on the plaintiff to set out the consideration at length. I think that it was not necessary; for, if the consideration is admitted by the pleadings, the deed may be supported, although, as set out, it does not of itself express a sufficient consideration. No case has been presented to us as having decided, that, in a declaration on a deed or instrument of this description, the consideration must of necessity appear upon the face of it. But there are many authorities to prove that a consideration *dehors* a deed may be stated or shewn in pleading. Although a bargain and sale without consideration is void, yet Lord *Coke* says (a): "Albeit no valuable consideration be expressed in the indenture, yet, if any were given, the same may be averred, and the land does sufficiently pass." So, in *Mitchel v. Reynolds*, Lord Chief Justice *Parker* said (b), that, although it might be made a question, that, supposing it did not appear whether or not the contract was made upon good consideration, or was merely injurious and oppressive, he did not see why that should not be shewn by pleading. In *Villiers v. Beaumont* (c), an assurance was made to a woman, to the intent that it should be for a jointure, but it was not so expressed in the deed; and yet the Court held, that it might be averred that it was for a jointure, and that such covenant was not traversable. In *Monnington v. William* (d), the defendant in replevin avowed for a rent-charge, and set forth that the plaintiff granted a rent to *J. S.*, in fee, who granted, bargained, and sold it to the avowant; and, upon issue on *non concessit*, it was found for the avowant; and, although it was afterwards moved in arrest of judgment, that no consideration for the grant was alleged, yet the Court held that it was good after verdict, as it should be intended that evidence was given of the consideration on the trial

(a) 2 Inst. 672.

(c) Dyer, 146.

(b) 1 P. Wms. 191.

(d) 1 Vent. 109.

If, therefore, a consideration be admitted by the pleadings, it is sufficient. But, if the issue raise a question, whether there was any consideration or not, as, if the defendants in this case had demurred specially to the declaration, or craved oyer of the deed, and, on its being produced, there did not appear to have been any adequate legal consideration, it would not have sufficed, as nothing could be added to what was stated or might be found in the deed, nor could its meaning or intent be explained by parol testimony. But that is not the ground on which we shall decide this case. In the declaration, it is distinctly stated, that the defendants, for *the considerations in the deed mentioned*, covenanted with the plaintiff that they would not enter into, or pass through, certain towns, to solicit orders, within certain periods therein limited; and, consequently, it appears that the deed was founded on some consideration. If the defendants had intended to object to the sufficiency of the considerations as set out in the deed, they should have demanded oyer; but, as they have not done so, we must presume that it did contain a sufficient legal consideration. So, they might have demurred specially to the declaration, and assigned for cause, that there was no sufficient consideration expressed therein; but, as they have done neither, it appears to us that there is a sufficient statement of consideration in the declaration for the restraints to which the defendants covenanted to submit, and consequently that there must be —

Judgment for the plaintiff (a).

My Brother *Gaselee*, who is obliged to be absent on account of indisposition, fully concurs in the judgment of the Court.

(a) See *Hayward v. Young*, 2 Chit. Rep. 407.

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In *assumpsit* for the breach of an agreement, the declaration contained four counts, some of which were bad in law; and the Jury found a general verdict for the plaintiff. The evidence applied to the first count. After writ of error brought, and after argument in the Court of *King's Bench*, this Court ordered the *postea* to be amended, by entering the verdict for the plaintiff on the first count, and for the defendant on the others; and they also ordered the judgment-roll to be amended by the amended *postea*, after the judgment of this Court had been reversed, and entered of record in the Court of error.

RICHARDSON v. MELLISH.

THIS was an action of *assumpsit* on a special agreement, and was tried before Lord Gifford, at *Guildhall*, at the Sittings after *Hilary* Term, 1824. The declaration contained four special counts, and the usual money counts. The defendant pleaded the general issue, and the Jury found a general verdict for the plaintiff on all the counts, —damages, 7,500*l.* In *Easter* Term, 1824, a rule *nisi* was obtained by the defendant, to set aside the verdict, and that a new trial might be had, or that the judgment might be arrested; and, in support of the latter objection, it was contended, that the agreement set out in the declaration was without consideration, or at all events illegal, as being contrary to public policy, and the bye-laws of the *East India Company*. The Court, after a full and able argument, in *Trinity* Term, 1824, ordered the rule to be discharged (a). The defendant afterwards removed the cause, by writ of error, to the Court of *King's Bench*, and it came on there for argument at the Sittings in *banc* after the last Term; and, on its being insisted, that some of the counts in the declaration were bad, as they did not set forth any sufficient consideration for the promises stated therein, and, therefore, that the verdict could not be supported, that Court took time to consider. Under these circumstances—

Mr. Serjeant *Bosanquet*, on a former day in this Term (and before the Court of *King's Bench* had pronounced judgment), obtained a rule *nisi* that the *postea* might be amended by the notes of Lord Gifford, by entering a verdict for the plaintiff on the *first* count of the declaration, and for the defendant on the other counts. The learned Serjeant founded his motion on an affidavit, which stated, that, on an application being made to his Lord-

(a) See 9 B. Moore, 435; S. C. 2 Bing. 229.

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ship to alter the *postea* as above, he refused to interfere, he having been promoted to the office of Master of the Rolls since the cause was tried; but he advised the plaintiff to make the present application to the Court. It was also sworn, that it was necessary that the amendment should be made, for the purpose of the due administration of justice. The learned Serjeant relied mainly on the case of *Williams v. Breedon* (a), where, a general verdict having been given on two counts, one of which was bad, and it appeared by the Judge's notes that the Jury had calculated the damages on evidence applicable to the good count only, the Court directed the verdict to be amended by entering it on that count, although evidence was given applicable to the bad count also. In *Short v. Coffin* (b), the Court of *King's Bench*, after a writ of error, and *in nullo est erratum* pleaded, and an argument in the *Exchequer Chamber*, amended a judgment which had been entered against an executor, *de bonis propriis*, by making it *de bonis testatoris, si &c., et de bonis propriis, si non &c.* In *Tidd's Practice*, it is said (c), that the amendment may be made in any stage of the proceedings; and those things which are amendable *before* error brought, are amendable *afterwards*; and that, after error brought in the *King's Bench*, on a judgment of the Court of *Common Pleas*, the amendment may be made in the former Court, or in the Court below; and that, if the clerk of the treasury of this Court attend with the record in the *King's Bench*, the latter Court, on motion, will order the transcript to be amended by it. In *Doe d. Church v. Perkins* (d), it was held, that the *postea* might be amended by the Judge's notes, after final judgment, and a writ of error brought, and joinder in error: and in *Petrie v. Hannay* (e), in *assumpsit*, the defendant

(a) 1 Bos. & Pul. 329.

(b) 5 Burr. 2730.

(c) 7th Edit. 747.

(d) 3 Term Rep. 749.

(e) Id. 659.

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pleaded the general issue and the statute of limitations, and a verdict having been found for the plaintiff on the first issue, and no notice taken of the last, the defendant brought a writ of error in the House of Lords, and assigned for error, that no verdict was given on the second plea; and the Court of *King's Bench*, after such error had been assigned, allowed the plaintiff to amend according to the Judge's notes, by adding a verdict for him on the second plea. Although, in *Harrison v. King* (a), where a general verdict was taken for the plaintiff, the Court refused to allow it to be entered on one count, according to the evidence on the Judge's notes, yet there, no application was made for the amendment until after the lapse of eight years, and *after* the judgment had been reversed in error. Here, however, the original record remains in this Court, and, if the *postea* be amended as prayed, the Court of *King's Bench* will order the transcript to be amended in conformity thereto.

[Lord Chief Justice *Best* read the notes of Lord *Gifford*, who stated, that an agreement was given in evidence, which corresponded with and proved the first count, in which the whole of the agreement was set out, and from which it appeared that the plaintiff was the commander of an *East India* ship called the *Minerva*, and that the defendants wished to purchase the command, provided the plaintiff would give it up and allow a person of the name of *Mills* to be appointed, on condition of the plaintiff's being reinstated in case of the death of *Mills*, and provided the *East India Company* would assent to such exchange of command. It was proved that the former owners, with the approbation of the Company, had appointed the plaintiff to command the ship for a voyage next following the date of the agreement; and that a commander

(a) 1 Barn. & Ald. 161.

could not be removed after he had been approved of by the owner for a particular voyage, without the assent of the Company; that the former owners wished to sell the *Minerva* as a free ship, to which no commander was attached, and that the plaintiff refused to give up the command to them; that, after the agreement between the plaintiff and defendant, the latter wrote to the *East India Company*, requesting them to permit the plaintiff to exchange the command of the *Minerva* for that of the *Marquis of Ely*; and that, at the foot of the letter, the plaintiff wrote, that the exchange was made with his sanction and approbation; and that, on the receipt of that letter, orders were sent from the *India House* to swear the plaintiff into the command of the *Marquis of Ely*, and *Mills* into the command of the *Minerva*; that *Mills* died on board the *Minerva*, and that the plaintiff afterwards applied to the defendant to be reinstated in the command, according to the terms of the agreement; and that, on the defendant's refusal, the present action was commenced. His Lordship, in conclusion, stated, that he was satisfied with the verdict, and thought that the amendment ought to be allowed.]

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Mr. Serjeant *Lawes*, and Mr. Serjeant *Wilde* now shewed cause.—This is not an application to the jurisdiction, but merely to the discretion, of the Court. It is, therefore, incumbent on the party applying for the amendment to shew that it is absolutely necessary; whereas it is merely alleged that it is requisite for the due administration of justice. There is consequently no ground to induce the Court to interfere; particularly as the evidence at the trial might have applied to other counts than the first; and the third and fourth cannot be supported, as there is no sufficient apparent consideration for the promises therein set forth. Where general damages are given on a declaration containing several

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counts, and one count is defective, and the evidence at the trial applies to that count only, the verdict may be amended by the Judge's notes, and confined to the good count; but, if the evidence applies to all the counts, the *postea* cannot be amended, because it is impossible for the Judge to say on which of the counts the Jury found the damages, or how they had apportioned them. Although, in *Short v. Coffin*, the Court of *King's Bench* allowed a judgment to be amended after argument in the *Exchequer Chamber*; yet, it was on the ground that the mis-entry was the mistake of the clerk. So, in *Chapman v. Gale* (a), the amendment was allowed, on an affidavit which stated that the judgment had been erroneously entered, through the misprision of the attorney's clerk.

At all events, the application for the amendment should have been made in an earlier stage of the proceedings. The plaintiff should have made his election on which count the verdict should be entered, either at the trial, or within a reasonable time afterwards, or when the motion was made to arrest the judgment. In *Lee v. Muggeridge* (b), the Court compelled the plaintiff, in the Term after the trial, to elect on which count he would enter up the verdict, which had been taken generally. In *Grant v. Astle*, where the plaintiff obtained a general verdict, on which judgment was entered up, the defendant brought a writ of error, and Lord *Mansfield* said (c): "In civil cases the rule is now settled, and we have gone as far as we can by allowing verdicts to be amended by the Judge's notes. That might have been done in this instance, in an earlier stage of the proceedings, but cannot now, after judgment;" and the Court awarded a *venire de novo*. In *Harrison v. King*, Mr. Justice *Abbott* said (d): "Where a declaration consists of many

(a) 2 Lev. 22.

(b) 5 Taunt. 36.

(c) 2 Doug. 730.

(d) 1 Barn. & Ald. 163.

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counts, it is the duty of the plaintiff to consider at the trial upon what counts he will have the verdict entered, and to apply to the Judge at that time, in order that the verdict may be entered on the good counts; but, as this must necessarily be attended with great delay at the trial, it has been the habit and practice to do that afterwards which could not conveniently be done at the trial. But still, I think the application should be made recently after the trial, for the Judge bears then in memory much of what has passed at the time, whereas it is impossible to suppose, that, at a great distance of time, any human memory can recollect the circumstances." In this case, when the motion was made to arrest the judgment, it was sufficient to arouse the suspicions of the plaintiff; and he ought then to have seen whether all the counts in his declaration could be supported. In *Eddowes v. Hopkins*, Mr. Justice Buller said (a), "there was this distinction, that, if there was only evidence at the trial upon such of the counts as were good and consistent, a general verdict might be altered from the notes of the Judge, and entered only on those counts; but that, if there was *any* evidence which applied to the other bad or inconsistent counts—as, for instance, in an action for words, where some actionable words are laid, and some not actionable, and evidence given of both sets of words, and a general verdict—there the *postea* could not be amended, because it would be impossible for the Judge to say on which of the counts the Jury had found the damages, or how they had apportioned them: that, in such a case, the only remedy is by awarding a *venire de novo*." But, in *Holt v. Scholefield* (b), where some of the counts in the declaration were good and some bad in law, and general damages were given, the Court ordered the judgment to be arrested, and would not award a *venire de novo*, and Mr. Justice Lawrence said, that the plain-

(a) 1 Doug. 377.

(b) 6 Term Rep. 691.

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tiff ought not to be at liberty to amend by the Judge's notes, because the evidence applied as well to the bad as to the good counts. *Williams v. Breedon* was decided, on the ground that it sufficiently appeared that the Jury had calculated the damages on one count only. In *Scougull v. Campbell* (a), the Court refused an application to amend the entry of a verdict according to the notes of an arbitrator, to whom the cause had been referred; and said, that, "where a party was desirous of entering a verdict according to the Judge's notes, the Court had no power to make any order upon the subject, still less to have the Judge's notes brought before the Court; and that the usual practice in such cases was, to go before the Judge himself, and have the verdict entered according to his notes; it was not an application to the Court." In *Newcombe v. Green* (b), the *postea* was amended by the Judge's notes by rectifying a mistake of the associate, who had only marked 'one shilling' damages, instead of '274*l.* 4*s.* 11*d.*,' the verdict found by the Jury, and so entered by the Judge in his minutes. So, in *Taylor v. Whitehead* (c), the officer, having by mistake entered a verdict for the defendant on three issues in trespass, whereas the Jury found for the plaintiff on the first and second, and for the defendant on the last only, the Court ordered the *postea* to be amended by the Judge's notes. Although in *De Tastet v. Rucker* (d), the Court of *Exchequer Chamber* allowed the transcript of the record to be amended after error brought; yet it was on the ground, that the officer of the Court had omitted to enter the finding of the Jury on issue joined on a plea of set-off. Although, therefore, the *postea* may be amended by the Judge's notes where there has been a mistake by the officer, yet the Courts have never allowed an amendment after writ of error, where the mistake has appeared on the

(a) 1 Chit. Rep. 283.

(c) 2 Doug. 746.

(b) 1 Wils. 33; S. C. 2 Str. 1197.

(d) 6 B. Moore, 137.

face of the proceedings, or the party applying for the amendment has been guilty of *laches*; and, as all the counts in this declaration were founded on one and the same agreement, the evidence, or, at all events, a part of it, might be applied to those counts which cannot be supported; and it is impossible to say on which count the Jury found their verdict. The plaintiff should have made his election at the trial, or, at all events, he should have made the application to enter the verdict on the first count of the declaration, when the motion was made to arrest the judgment.

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Mr. Serjeant *Vaughan*, Mr. Serjeant *Bosanquet*, and Mr. Serjeant *Taddy*, in support of the rule, were stopped by the Court.

Lord Chief Justice BEST.—I am of opinion that the plaintiff, both in justice and law, is entitled to retain his verdict, not only on the ground that my Lord *Gifford*, who tried the cause, has reported to us that he is perfectly satisfied with it, but because this Court, after a full and ingenious argument, discharged the rule for a new trial and in arrest of judgment. The only thing that induced me to pause was, a doubt I had whether, after the record was gone from this Court, we had authority to amend the *postea*; but it appears that, on several occasions, this Court has ordered such an amendment to be made, not only after the record has been removed, but after argument in a court of error. If only one case had been found, I should have been disposed to act upon it. It is true that a court of error cannot amend, as they have nothing to amend by until the proceedings are amended in the Court below; and, if this Court could not amend, instead of a court of error being for the advantage of the country, (the object of its creation being to obtain an uniformity of decisions consonant to reason and to law), such Court would be

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not only of no avail, but a perfect nuisance; and it is never too late for us to do what is necessary to be done for the purpose of preventing injustice. In *Short v. Coffin*, the Court of *King's Bench* allowed a judgment against an executor to be amended after writ of error brought, and argument in the *Exchequer Chamber* thereon; and Lord *Mansfield* said: "It is not an error in the judgment of the Court in point of law." Here, the merits as well as the law of the case were fully argued before us, on the general grounds that no sufficient consideration appeared on the whole of the declaration, and that, even if there were, the agreement on which the action was founded was void, being against law. If our attention had been drawn to the different counts of the declaration, or it had been said that there was a consideration expressed in one count only, and not in the others, we should, without the least hesitation, have directed the *postea* to be amended by entering the verdict on the count which was good. But this was not adverted to at the time, although a motion was made in arrest of judgment, and discharged; and, although it has been said that the plaintiff has been guilty of laches in not making the application then, yet his attention was never drawn to any difference between the counts; nor did it occur to the defendant's counsel that any material variance existed: the point was argued on the whole of the declaration. It has been further said, that the writ of error should have aroused the plaintiff, or raised his suspicions; but the principal error assigned was, that the declaration did not set forth any good or sufficient consideration for any of the promises stated in the declaration: no distinction was made, in the assignment of errors, between the different counts. The plaintiff, therefore, could not have been aware that the court of error would ground their opinion on some or one of the counts in the declaration. It has been most properly and truly admitted that this is an application to the discretion of the Court; and it has been

stated to us on affidavit, that the amendment was necessary for the due administration of justice. We alone are to judge as to the reasonableness of the time within which such an application as this should be made. That must depend upon the circumstances of each particular case; and here it does not appear to me to be unreasonable. It has been insisted that the evidence given at the trial might have been applicable to all the counts; but the learned Judge who tried the cause has reported to us that the evidence sustained the first count; and it is manifest from the report that it was quite sufficient to support it. That count was expressly founded on the agreement, which in strictness corresponded with it, and for the breach of which the plaintiff sought to recover damages in this action. But, putting it on principle, it is sufficient for us to say, that justice requires this amendment to be made; and more particularly so, as the damages would not have been different, if the verdict had been taken on the first count only, as no evidence was adduced which was not strictly applicable to or admissible under that count. Although, in an action of slander, if some words are proved which are not actionable in themselves, and others which are, and the former could not have been proved but for the bad counts in the declaration, the Court would not direct the verdict to be entered on the counts which were good; and although Mr. Justice *Buller*, in *Eddowes v. Hopkins*, said, that, where some actionable words were laid, and some not actionable, and evidence given on both sets of words, and a general verdict, the *postea* could not be amended; yet it must be inferred that he meant that the amendment could not be allowed where evidence was admitted under the bad counts, which could not have been received under the good. But here, as all the evidence was admissible under the first count, and abundantly sufficient to support it, I am of opinion that the rule for amending the *postea* must be made absolute.

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Mr. Justice PARK.—I am also of opinion that the *pos-
tea* must be amended in the terms prayed. It has been
most properly admitted, that the application is to the
discretion of the Court, although it has been said that they
would not exercise it unless the applicant shewed some ne-
cessity for their doing so, and that here it is merely sworn
that the amendment is necessary for the due administra-
tion of justice. If we were not to allow this amendment,
we should be defeating the administration of justice rather
than advancing it. As the case now stands, it must be
taken for granted that the Jury came to a right conclusion
at the trial. The plaintiff sustained a serious injury by
the breach of the agreement; and although the Jury
awarded large damages, Lord *Gifford*, who tried the
cause, has told us that he is perfectly satisfied with their
verdict. It has been further said, that the Court is not
empowered to grant the amendment, but that the Judge
who tried the cause can alone do so. But that appears to
me to be erroneous. It is true, that applications of this
nature are usually made to the Judge who tried the cause,
provided he be living and still in Court; but, if he has
left it, the Court itself has authority to amend. We have
been furnished with the notes of the Judge, from which
it appears that the first count of the declaration was fully
supported by the evidence, the whole of which was ap-
plicable to that count. It has been insisted that the ap-
plication was made too late, although it was admitted, that,
if it had been made at *Nisi Prius*, the verdict might have
been entered on the first count, as a matter of course. So,
the application might undoubtedly have been made in the
course of the term succeeding the trial. Where a decla-
ration consists of several counts, it is impossible that coun-
sel can be prepared at the moment to determine upon
what counts the verdict must be entered; and in this
case neither the attention of the Court nor of counsel was
drawn to this point, until the application for the amend-

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ment was made. The only error assigned, was, that the declaration did not set forth a sufficient consideration for *any* of the promises therein contained. The motion for a new trial and in arrest of judgment was also founded on the want as well as the illegality of the consideration; and the Court, in giving their opinions, not having their attention drawn to any particular count, decided, that, on the whole of the declaration, there appeared to be a sufficient consideration. In *Doe d. Church v. Perkins*, the Court said (a): “That, according to the practice of amending by the Judge’s notes, which was of infinite utility to the suitors, and was as ancient as the time of *Charles the First*, the amendment might be made at *any* time.” Although the case of *Harrison v. King* has been relied on to shew that the application should be made either at, or recently after, the trial; yet that case appears to have no bearing on the present. There, the amendment was applied for, not only after writ of error brought, but *after the judgment of the Court of King’s Bench had been reversed in the Exchequer Chamber, and eight years had elapsed* from the time of the commencement of the action. Here, however, before the judgment of the court of error was pronounced, it was ascertained that some of the counts of the declaration were bad; and therefore the plaintiff had a right to come to this Court, in which the proceedings were originally instituted, and trial had, and apply to us to rectify a mere slip or omission of counsel. If the application had been made to Lord *Gifford* at the trial, or during the time he presided in this Court, there can be no doubt but that he would have ordered the verdict to be entered on the first count, as is now prayed.

Mr. Justice BURROUGH.—I am of the same opinion. When the motion for a new trial and in arrest of judg-

(a) 3 Term Rep. 750.

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ment came before the Court, the case was fully argued on its merits; and we took considerable pains to ascertain whether the transaction was illegal, or contrary to the bye-laws of the *East India Company*. We did not come to a hasty conclusion; nor did we deliver our opinions until after full consideration of all the objections raised on the part of the defendant. As to whether the amendment may now be allowed,—although I have frequently heard the subject canvassed at the bar, yet, from the earliest part of my professional life, to the present time, I have always understood the principle to be, that an amendment may be made at any time when a party can see his way clearly. Motions for amendments are as common as the justification of bail; and here there can be no question but that the merits and justice of the case require the proposed amendment to be made. No objection has been raised as to the damages being excessive. The Jury thought the plaintiff entitled to them for the breach of the agreement entered into by the defendant. The first count of the declaration was proved; and the whole of the evidence applied to and was admissible under that count. The learned Judge who tried the cause has informed us that he was satisfied with the verdict, and has furnished us with his notes of what took place at *Nisi Prius*, and, further, has expressed his opinion that the amendment ought to be allowed.

Mr. Justice GASELEE.—This is not an application to amend the record, but merely the *postea*. If, indeed, we had been called on to amend the record, it might be considered as an application to the jurisdiction of the Court. But it has been said, that, under the circumstances of this case, we have no authority to order the amendment in the terms prayed, as the application could only be made to the Judge who tried the cause. If he had still remained a Judge of this Court, we should not have interposed; but he has been applied to, and has not only transmitted to us

his notes of what took place at *Nisi Prius*, but furnished us with his opinion; and, as he doubted whether he was empowered to order the amendment, he has called on us for our assistance. I consider that we are now sitting at his request. No complaint has been made that his report is insufficient or inaccurate; neither has it been thought necessary that his memory should be refreshed as to any particular fact that occurred at the trial which he has not reported to us; nor has any misconduct been attributed to any of the parties. As, therefore, the Court acts in aid of Lord *Gifford*, and no formal complaint has been made, it appears to me that we may proceed on his report, which is conclusive as to the evidence adduced before him at the trial. As to the time within which the application should have been made, I should have felt some difficulty, if we had not been referred to a case where an amendment of this description was allowed after writ of error brought, and argument in the Court of error; and it appears to me that no material distinction can be drawn, whether the error in entering up the verdict be the misprision of the clerk, or the act of the party who takes the verdict. The true ground is this—whether there be several distinct causes of action, substantially differing from each other, on the face of the record, on all of which the evidence given may apply, so as to render it impracticable to sever the damages. The case of *Williams v. Breedon* in substance establishes this principle. It was there held that, where a general verdict had been given on two counts, one of which was bad, and it appeared by the Judge's notes that the Jury calculated the damages on evidence applicable to the good count only, the Court might amend the verdict by entering it on that count, although evidence was given applicable to the bad count also. Although it is true that in that case there were two distinct causes of action, yet the principle is the same. Here, although there were four special counts in the declaration,

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they all related to but one and the same subject matter, and disclosed but one cause of action, *viz.*, the breach of the agreement; and *all* the evidence admitted tended to support the first count, in which the whole of the agreement was set out: the verdict, therefore, ought to have been entered on that count. If there had been several distinct breaches, and evidence had been given on some which did not apply to the first count, the judgment could not have been entered on that count alone; but, as the breaches in all the counts allege in effect the same cause of complaint, such an objection cannot avail. The defendant, therefore, is in strictness entitled to have a verdict entered for him on the three last counts, as they all refer to the cause of action set out in the first, *viz.*, the breach of the agreement. The declaration has not been objected to on account of its length; and although it has been contended, that the suspicions of the plaintiff ought to have been awakened long before he made this application, yet, when the motion was made for a new trial and in arrest of judgment, no objection was made to any particular count, but the case was fully argued on its merits. So, in the assignment of errors, the principal error assigned was, "that the declaration aforesaid does not set forth any good or sufficient consideration for any of the promises therein stated." No distinction was made as to either of the counts, nor was the assignment of errors limited to any count in particular. I am therefore of opinion that the *postea* must be amended agreeably to the notes of Lord Gifford, in the terms prayed.

The Court then said, that, if the defendant would allow the judgment-roll to be amended by the *postea*, the rule should be made absolute with costs; otherwise, without.

Rule absolute accordingly.

Friday, November 25th.—The *postea* having been amended without costs, and the defendant having refused to allow the judgment-roll to be amended by it—

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Mr. Serjeant *Vaughan*, on this day, applied for a rule *nisi* that the judgment-roll might be amended and made conformable with the *postea*, when—

Mr. Serjeant *Wilde* informed the Court, that the Court of *King's Bench* had just pronounced judgment in error, reversing the judgment of this Court, and had awarded a *venire de novo*.

Mr. Serjeant *Vaughan*, for the plaintiff, insisted, that, as the record remained here, and the transcript only was sent up to the Court of *King's Bench*, the amendment ought to be allowed; and the rule *nisi* was granted accordingly.

Saturday, November 26th.—Mr. Serjeant *Lawes* and Mr. Serjeant *Wilde* now shewed cause, on an affidavit which stated, that the Court of *King's Bench* had reversed the judgment of this Court, and awarded a *venire de novo*, and that a writ of *venire facias de novo* had been also directed, and a judgment of reversal entered of record in the Court of *King's Bench*, which record was now in Court, and ready to be produced, if required. Under these circumstances, it was submitted, that the application for the amendment of the judgment-roll should have been made to the Court of *King's Bench*, as the record no longer remained here, it being in that Court by intendment of law; as, when the writ of error was brought, the record itself, and not merely a transcript, was carried from this Court to the *King's Bench*. In *Rutter v. Redstone* (a), after error in the *Exchequer Chamber*, the tran-

(a) 2 Str. 837.

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script was brought back and amended in the Court of *King's Bench* by the original record; and it was held necessary to make the amendment there, as it differed from a writ of error from this Court, because the *Common Pleas* sends up the very record itself, and the *King's Bench* sends only a transcript. So, no execution on the judgment could issue out of this Court; and, if satisfaction were to be entered on the roll, the application must be made to the Court of *King's Bench*, as the record has been removed, and still remains there. The plaintiff in error is bound to certify the record into the Court of *King's Bench*; and the Chief Justice of this Court makes his return accordingly. Although in *Doe d. Church v. Perkins* (a) the Court of *King's Bench* said that the *postea* might be amended at any time, yet there the application was made before argument in error; but here, the motion to amend the judgment-roll was clearly too late, as the Court of *King's Bench* had previously pronounced judgment of reversal, and directed a *venire de novo*, which was duly entered of record; and in *Harrison v. King* (b), where a general verdict was taken for the plaintiff on several counts, the Court refused to allow it to be entered on particular counts, according to the evidence on the Judge's notes, *after* the judgment had been reversed in error for a defect in one count. That case is expressly in point; and the observations there made by Mr. Justice *Abbott* apply most forcibly to shew that this application is, at all events, too late; and there is no decision which goes the length of shewing that a judgment-roll can be amended after the judgment has been reversed by a Court of error.

Mr. Serjeant *Vaughan*, and Mr. Serjeant *Bosanquet*, in support of the rule.—It is a fallacy to suppose that the record is actually removed out of this Court, or that it is

(a) 3 Term Rep. 750.

(b) 1 Barn. & Ald. 161.

under the control of the Court of *King's Bench*. The judgment-roll still remains here; and only the transcript or copy of the record was transmitted to the Court of *King's Bench* when the Chief Justice made his return to the rule to certify the record. Besides, if the judgment-roll be not amended, it will be at variance with the *postea*. The entry of a general verdict on the *postea* originated in the mistake of the Associate at *Nisi Prius*; and the entry on the judgment-roll according to the *postea* was also a misprision of the clerk who made up the roll. When, therefore, the *postea* is amended, it follows, as a matter of course, that the judgment-roll should be amended also, in order to make them consistent and conformable with each other. In *Wood v. Matthews* (a), the issue in this Court was, whether one *J. S.* were taken by a *capias ad satisfaciendum* or not; and, upon the trial at *Nisi Prius*, the Jury found for the plaintiff in the action, to wit, that the party was not taken by the said *capias*; and upon the back of the panel, the entry was *dicunt pro quer.*; but, on the back of the *postea*, the clerk of the assizes certified the panel thus, to wit, that the Jury say that no *capias* was awarded; which was otherwise than was put in issue or found by the Jury; and the roll of the record was according to the *postea*; and upon this judgment given for the plaintiff: upon which this variance between the issue and verdict was assigned for error; and, after deliberation had upon this point, and this matter alleged by the defendant in the writ of error, and certified out of this Court, the Court of *King's Bench* awarded, that the record sent up out of this Court by the writ of error should be amended according to the indorsement on the panel, for that such indorsement was the warrant for the certifying of the *postea*, and so this warrant over to him who makes the entry upon the roll; and therefore, whereas it was alleged that the *postea* was amended in this Court after the record re-

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(a) Poph. 102.

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moved, it was held to be well done here; for, although the record was removed by the writ of error, yet, the *Nisi Prius*, the *postea*, and the like, remain still here, as it is of the warrant of attorney and the like; and, if the *postea* had not been amended here, but sent up with that which was indorsed upon the panel, all shall be amended in the *King's Bench* according to that which was indorsed upon the panel. In that case, it seems that this Court amended the *postea* after error; and the Court of *King's Bench* amended the record there. This Court, therefore, has clearly a right to amend all proceedings remaining here, although the record may be sent up to the Court of *King's Bench*. In *Friend v. The Duke of Richmond*, error was brought in the *Exchequer Chamber* on a judgment of the Court of *King's Bench*, in ejectment, and in the record a space was left to insert the costs, which had not been taxed, and it was prayed that it might be amended; and Lord Chief Baron *Hale* said (a): "It is the constant practice, that, if a record be removed into the *King's Bench* out of the Court of *Common Pleas* by a writ of error, and afterwards amended by rule of Court in the *Common Pleas*, the Court of *King's Bench* must amend it accordingly; but without such rule they must not amend it. So, if a record removed hither (*vis.* to the *Exchequer Chamber*) be mistaken, it is amendable by the record in the *Common Pleas*, brought into this Court by an officer out of the *Common Pleas*: because these things are in affirmance of the first judgment, and are therefore favoured in law." In *Pickwood v. Wright* (b), where a verdict was given for a larger sum than the amount of the damages laid in the declaration, for which cause a writ of error was brought, this Court permitted the plaintiff to enter a *remittitur* of the excess above the sum laid in the declaration, although it was insisted that it was too late to enter the *remittitur* after judgment signed and error brought. So, in *Hardy*

(a) *Hardres*, 305.

(b) 1 H. Bl. 643.

v. *Cathcart* (a), the record in a penal action, where the Jury by mistake gave damages, being carried by writ of error to the Court of *King's Bench*, it was held that the plaintiff might enter a *remittitur* of the damages on the record, and that the transcript might be made conformable thereto. Although the case of *Harrison v. King* has been relied on for the defendant, it is distinguishable from the present, as there no application was made for the amendment to the Court where the action was commenced, and there had been a lapse of eight years before any application was made to the Court of *King's Bench*.

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Lord Chief Justice BEST.—It has been said that a writ of error to this Court removes the original record into the Court of *King's Bench*, but that a writ of error to the *King's Bench* only removes a transcript of the record of that Court into the *Exchequer Chamber*. But our officers have informed us that the original record still remains here, and that a transcript only is carried into the Court of *King's Bench*. After the cases and authorities to which we have been referred, there can be no doubt but that we are empowered to do what we have been desired, *vis.* to amend the judgment-roll by the *postea*; and there is as little doubt that we ought in this case to exercise that power. If the Court of *King's Bench* were applied to to amend the record, they would answer, that they had nothing to amend by. But, if the original record be incorrect, and we have something by which we can amend it, we certainly ought to do so; and then the Court of *King's Bench* may amend their record by the amended record of this Court. But, if we were to refuse the present application, the Court of *King's Bench* must give judgment on a false record, as we have already ordered the *postea* to be amended, which has been done. But it has been said, that the application

(a) 1 Marsh. 180; S. C. 5 Taunt. 2.

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to amend the judgment-roll was made too late, as the Court of *King's Bench* had pronounced judgment of reversal, and awarded a *venire de novo* before the rule *nisi* was granted. We are not bound to know what passed in the Court of *King's Bench*; but it seems that they did not reverse the judgment of this Court because it was erroneous or bad in law, or that there was no good count in the declaration; but, as they thought the two last counts could not be supported, they directed a *venire de novo*. Our attention was never called to any distinction between the different counts, and we thought that there was a sufficient consideration to support the first, to which my Lord *Gifford* has reported that all the evidence applied. There can be no doubt, therefore, but that we were empowered to amend the *postea*, by entering the verdict on the first count; and we are now desired to amend the record by making the judgment-roll conformable with the *postea*, for, on reference to the *postea*, as it now stands, it will appear that the verdict was entered on the first count, whereas the judgment-roll represents it as having been taken generally on all. It was the duty of the associate to enter the verdict on the *postea*; and, if he had entered it on all the counts of the declaration, when it ought to have been entered on the first count only, we should have allowed the mistake to be corrected so as not to allow the Court of *King's Bench* to give judgment on an erroneous record; such error arising from the mere mistake or misprision of the officer. It is, therefore, our duty to amend the record according to the fact. If the application to enter the verdict on the first count had been made to Lord *Gifford*, at *Nisi Prius*, or previously to his quitting this Court, there can be no doubt but that he would have directed it to be done, and the *postea* to be amended accordingly. It is not the duty of a Judge to say on what particular count a verdict is to be entered; but, if all the evidence applies to one which may be supported, the

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verdict ought to be entered on that count. There are various authorities to shew that we may amend the *postea* and the record after writ of error brought; and that the Court of *King's Bench* may then amend their record by the amended record of this Court. In *Wood v. Matthews* this Court amended the *postea* after error, and the Court of *King's Bench* also amended the record in their Court; and the case of *Whitfield v. Wright* was there cited as a precedent, as also a case in the *Exchequer Chamber*, where similar amendments had been made. We certainly ought to amend what remains in this Court; and, although the record may virtually go to the Court of error, yet enough remains here to shew that we have something to amend by, and, when that is done, and the record made perfect, the Court of *King's Bench* will look at it in its amended and perfect state, and act accordingly. In the case of *Friend v. The Duke of Richmond*, Lord Chief Baron *Hale* said: "It is the constant practice, that, if a record be removed into the *King's Bench*, out of the Court of *Common Pleas*, by writ of error, and afterwards amended by rule of Court in the *Common Pleas*, the Court of *King's Bench* must amend it accordingly." The word *must* appears to me to be too strong, but, at all events, the Court of *King's Bench* may amend if they think proper, and they will do so where the justice of the case requires it; and, unless the present application were granted, that Court could not amend, as they would have nothing to amend by: and their judgment would be founded on an erroneous record, as the judgment-roll would be at variance with the *postea*. In *Pickwood v. Wright*, where a verdict was given for a larger sum than the amount of the damages laid in the declaration, and a writ of error was thereupon brought, this Court permitted the plaintiff to enter a *remittitur* of the excess above the sum laid in the declaration, on payment of the costs of the writ of error. So, in *Hardy v. Cathcart*, where the Jury, by mistake, gave damages in a penal action, the

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plaintiff was allowed to enter a *remittitur*, after error brought in the *King's Bench*; and, in *Dunbar v. Hitchcock* (a), after error brought from this Court into the *King's Bench*, and from that Court into the House of Lords, the Court of *King's Bench* allowed an amendment to be made in the record, by inserting the certificate of the Judge who tried the cause, allowing the plaintiff treble costs, which had been omitted by the clerk in entering the judgment in this Court; and also by inserting the true term in which the assignment of errors and joinder were made, instead of an entry on the judgment-roll, by the clerk of the Court of *King's Bench*, that they were made on an impossible day in another term; although both these errors were assigned in the House of Lords; and that was after the judgment of this Court had been affirmed in the *King's Bench*: and Lord *Ellenborough* said: "Here, the House of Lords have a defective record; diminution has been alleged, and, when it has been amended in this respect, upon being certified into the House of Lords, they will direct the transcript to be amended." So, here, when we have allowed the judgment-roll to be made conformable with the *postea*, the Court of *King's Bench* will, no doubt, amend their record by our amended record. That, however, is matter of future consideration for them, but I am clearly of opinion that we are fully warranted in making this rule absolute.

Mr. Justice PARK.—I am clearly of the same opinion. When this case came before the Court on a motion for a new trial and in arrest of judgment, we did not pass over it lightly, but gave it full and mature consideration. Although the verdict was taken and allowed to stand on all the counts of the declaration, it was merely because the counsel did not draw our attention to any distinction be-

(a) 3 Mau. & Selw. 591.

tween the counts; but several questions were raised and argued on the whole of the declaration. So, when the writ of error was brought, the errors assigned applied to the whole declaration. We have since ordered the *postea* to be amended according to the facts proved at the trial, and it has been done accordingly. The consequence is, that the entry on the judgment-roll is at variance with the *postea*; and surely we ought not to allow the one to be amended without the other, as the record would then be inconsistent on the face of it. Justice not only requires it to be done, but it would be the greatest absurdity if we were to allow one part of the record to be inconsistent or at variance with the other.

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Mr. Justice BURROUGH.—The first question to be considered is, how has the record gone from this Court. It is true, that, technically speaking, it has been removed to the *King's Bench*, but, in point of fact, it remains here. The mere transcript or copy is sent to the Court above, and they may revise it by our corrected record. What we have already done is confirmed by several previous decisions; and the question now is, whether we ought not to make the judgment-roll conformable with the *postea*. We must preserve the course we have already adopted, and, if so, it follows as a matter of necessity that we must amend the record; if not, it would be inconsistent on the face of it. It is not for us to enquire what the Court of *King's Bench* will do; but, when they see our amended record, they may think it advisable not to reverse our judgment *in toto*, or they may merely grant a *venire de novo* in order to ascertain the merits by a further enquiry. So, if that Court perceive that we have allowed the verdict to be entered on the first count of the declaration, they may reconsider whether that count be good or bad. If it can be supported, our judgment must be affirmed.

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They may say, the defendant in error may allege diminution, as the record in this Court was an improper record; but, when they ascertain that we have ordered the verdict and judgment to be altered, and to stand on the first count only, they will amend their transcript accordingly. If that count be bad, they will reverse our judgment altogether; but, if it can be supported, they will not order a *venire de novo*, as all the evidence at the trial was applicable to and admissible under that count. As, therefore, it appears to me that justice requires the amendment of the judgment-roll as well as of the *postea*. This rule must be made—

Absolute (a).

(a) Mr Justice Gaselee was absent.

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WALKER, Clerk v. RIDGWAY.

A farmer caused every tenth sheaf of wheat to be thrown out by the binders, for tithe, the others to be set up in shocks of different numbers, varying from six to ten:—*Held*, that this was not a legal mode of setting out the tithe, although no fraud was intended; as the tithe-owner should have an opportunity of comparing the tithe-sheaves with the others.

THIS was an action on the statute 2 & 3 *Edward* 6, c. 13, and brought against the defendant for not having properly set out his tithes of wheat.

At the trial, before Mr. Justice *Burrough*, at the last Assizes at *Hereford*, the plaintiff's bailiff or servant was called, and stated, that the defendant had reaped, in the course of the last harvest, several acres of wheat, and that, after it was cut, one man was employed to bind after two reapers, and another to set it up in shocks; that each shock contained several sheaves, varying in number from six to nine; that the binders, as they went on, threw out every tenth sheaf for the tithe; and that such sheaves were afterwards collected and laid together in irregular heaps.—The defendant called witnesses to shew that each tenth sheaf was thrown out fairly by the binder; and that it was of the

same size with the others which were set up in shocks. The learned Judge told the Jury that the plaintiff could not ascertain whether the sheaves were all of one size, without going to every shock and comparing those thrown out with those set up; and he thought that the binder's throwing out every tenth sheaf was not a proper mode of setting out the tithe, and said, that, if this mode of tithing could be supported, it would be necessary for the parson or tithe-owner to have a man in every field in which the tithes were to be taken, during the whole of the time of the reaping. The Jury, however, found a verdict for the defendant.

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Mr. Serjeant *Wilde*, on a former day in this Term, obtained a rule *nisi* that this verdict might be set aside and a new trial granted, on the grounds that the finding was against the opinion of the learned Judge who tried the cause, and that the mode of setting out the tithes adopted by the defendant could not be supported in law, as the parson or tithe-owner could not ascertain whether the sheaves thrown out for him by the binder were of equal size with those set up in shocks. If the shocks had contained ten sheaves each, the difficulty might have been removed; but, as the numbers varied in each shock, although every tenth sheaf might have been regularly thrown out, yet that might have been made smaller than the others.

Mr. Serjeant *Taddy* now shewed cause.—As the sheaves thrown out for tithe might be easily compared with those set up, it must be assumed that they were fairly thrown out; and whether they had been *bond fide* set out or not was purely a question for the Jury. Although this mode of tithing might be inconvenient to the parson, still the defendant was not bound to set up the sheaves thrown out for the tithe, nor was he obliged to put his own sheaves in shocks immediately after they were bound,

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or to place an equal or definite number of sheaves in each shock. That might depend either on the state of the crop or of the weather. In *Leathes v. Levinson*, Lord *Ellenborough* asked (a), "If the cutting and saving be done fairly and in the ordinary course of husbandry, and not fraudulently or capriciously, is there any decision which limits the farmer as to the mode of doing it?" "Rules of mere regularity," said his Lordship (b), "are after all only laid down to prevent fraud;" and here, the defendant proved that no fraud was intended, but that the sheaves thrown out were of equal size with those set up. In *Shallcross v. Jowle*, Lord *Ellenborough* said (c): "Corn must be tithed in the first convenient state in which the tithe can be collected after the corn is cut, which is, in sheaves;" and Mr. Justice *Le Blanc* and Mr. Justice *Bayley* expressly said, that corn must be tithed in the sheaf before it is put up in shocks. In *Halliwel v. Trappes*, Mr. Justice *Lawrence* said (d): "The common-law mode of tithing corn is in the sheaf;" and the cases of *Lamb v. Tattersall* (e), and *Bendish v. Kemble* (f), were referred to: and Mr. Justice *Chambre* said (g): "If the owner shocks his sheaves so soon as to prevent the comparison, the parson must of necessity have the right to pull them down to examine them, which would be attended with monstrous inconvenience." Here, the plaintiff had an opportunity of ascertaining whether the tithe had been fairly set out or not, as he might have compared the sheaves thrown out with those that were set up. The defendant's witnesses swore that that had been done fairly, and the Jury, by their verdict, have negatived every presumption of fraud.

Lord Chief Justice BEST.—No fault has been found with

(a) 12 East, 241.

(b) Id. 243.

(c) 13 East, 267.

(d) 2 Taunt. 58.

(e) 2 Wood's Tithe Cases, 418.

(f) Id. 345.

(g) 2 Taunt. 57

the manner in which this case was left to the Jury, nor is it alleged that they were misdirected. In setting out tithes, although every facility must be given to the farmer, yet due regard must also be had to the security of the parson from fraud or contrivance. The fair and recognized mode of setting out the tithe of wheat is in the sheaf. The time of setting it up in shocks must depend on circumstances; for, if the weather be fine, it may remain on the ground without injury; but, if it be precarious or showery, it is for the interest of the parson as well as of the farmer, that it should be put into shocks as soon as possible: whence arose the custom of tithing in shocks. But here it appears that the corn was bound in sheaves as soon as it was cut; that the binder threw out every tenth sheaf for tithe; and that the others were immediately set up in shocks, before the parson could have an opportunity of examining them. A custom to take tithe in the shock may be good; but, where such custom prevails, the shocks must contain an equal number of sheaves; here, however, it appears that the number of sheaves varied in each shock, some containing six, some seven, some eight, and others nine. Now, if each shock had contained ten, it would only have been necessary to count the number of shocks, and to ascertain that the sheaves in each were of the same size; but in this case it was impossible to calculate the number of sheaves without a minute examination of every shock, which would be productive of great trouble and inconvenience to the parson. Although it has been said that no fraud was contemplated by the defendant, yet, if such a practice as this were to prevail, it would certainly tend to fraud, against the mere probability of which the law is assumed to guard. A tithe-collector is not required to have the knowledge or experience of an arithmetician; and, although he may easily ascertain whether or not all the sheaves are of equal size, yet he is not bound to go to every shock in the field to ascertain the aggregate quantity of sheaves bound. As, therefore, it ap-

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peared here that each shock contained a different number of sheaves, I am of opinion that the tithe was improperly set out, and consequently that there must be a new trial.

Mr. Justice PARK.—Although it has been said that there was no fraud in this case, yet, in setting out tithes, it is incumbent on the party to shew that there is no probability of committing a fraud; and that is a fact to which the Court will attend. Here, the sheaves thrown out might be of a less size than those set up; and it was impossible for the plaintiff to ascertain the whole number without counting the number of sheaves set up in each shock.

Mr. Justice BURROUGH.—In *Tennant v. Stubbing* (a), it was held that tithes must be set out so that the parson may compare them with the other parts. There, wheat was unequally shocked, and every tenth sheaf was thrown aside for the rector; and Lord Chief Baron *Macdonald* held it to be an unreasonable custom, and void, as it deprived the tithe-owner of the advantage the law gave him of comparing the tithes set out with the remainder that was put in shocks. So, in *Franklyn v. Gooch* (b), the weather being precarious and uncertain, the farmer filled a cart-load, throwing nine sheaves into the cart, and laying aside the tenth for the tithe, and the same learned Judge held, that the conduct of the farmer was not strictly correct, and that such mode of tithing could not be supported. The rule is, that the parson may be enabled to see that the whole of the tithes are regularly set out before any part is shocked or carried away; or that he may have an opportunity of seeing his tithe separated from the other nine parts, so as to compare the one with the other. Here, although every tenth sheaf was thrown out by the binder, yet, as

(a) 3 Anst. 640; S. C. 4 Gwill,
1438.

(b) 3 Anst. 682; S. C. 4 Gwill,
1441.

the remaining sheaves were immediately set up in shocks, the plaintiff could not have an opportunity of examining the size of each sheaf without throwing down all the shocks; and, as the shocks contained unequal numbers of sheaves, it would, if such a mode of tithing could be supported, be productive of the greatest inconvenience to the tithe-owner, as he would be obliged to examine every shock in the field. Although, therefore, no fraud may be imputed to the defendant, yet, as the tithes were not properly set out, I am of opinion that the rule for a new trial must be made—

Absolute (a).

(a) Mr. Justice Gaselee was absent.

CROFTS v. WATERHOUSE.

Saturday,
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THIS was an action on the case. The declaration stated that the defendant was the owner and proprietor of a common stage-coach for the conveyance of passengers from *London* to *Exeter*, that the plaintiff was an outside passenger on the coach, and that, through the negligence, carelessness, and improper conduct of the defendant's servant, whilst proceeding in the course of the journey from *London* to *Exeter*, the coach was overturned; whereby the plaintiff was greatly bruised, wounded, and hurt. Plea—Not guilty.

At the trial, before Mr. Justice *Littledale*, at the last Assizes at *Dorchester*, it appeared in evidence that the defendant was the proprietor of a coach, called the *Regulator*, running from *London* to *Exeter*; that the plaintiff had been booked at the office in *London*, and paid his

The proprietor of a stage-coach is not liable for an injury sustained by a passenger in consequence of the accidental overturning of the coach, unless such accident be occasioned by the negligence or misconduct of the driver. Therefore, where, in an action for an injury of this description, it appeared that the cause of the accident was the removal (since the coach had last passed) of one of two cot-

tages that had previously stood on an angle of the road, by which means the driver was deceived as to the course of the road (it being night, though moonlight), and the Judge told the Jury, that, as the road was of sufficient width, and there was no obstruction or want of light, the coachman ought to have kept within its limits, and a verdict was found for the plaintiff: the Court granted a new trial, conceiving that it should have been left to the Jury to say whether or not the driver had been guilty of negligence.

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fare as an outside passenger to *Exeter*; that the coach arrived at a place called *Harman Hill*, which is about half a mile beyond *Salisbury*, between two and three o'clock in the morning; that it was quite light, the moon being full, and that there was nothing to prevent the coachman from keeping the middle or the left-hand side of the road (which was twenty-four feet wide), but that he drove the coach too near to the right and overturned it, by which the plaintiff received the injury complained of.

Several witnesses were called for the defendant, who proved, that one of two cottages which had previously stood at the turning of the road where the accident happened, had been pulled down since the coachman had last passed, that the rubbish had been left at the side of the road, and that the coachman, mistaking the cottage which was standing for that which had been pulled down, drove over the rubbish of the latter, whereby the coach was upset. The learned Judge was of opinion, that, as the road was of sufficient width, and there was no obstruction or want of light, the coachman ought to have kept within its limits and not endangered the lives of his passengers by turning so sharp to the right, even supposing that the accident was attributable to his having mistaken the cottage which was pulled down for that which remained standing. The Jury accordingly found a verdict for the plaintiff—Damages, 100*l*.

Mr. Serjeant *Wilde*, on a former day in this Term, obtained a rule *nisi* that this verdict might be set aside, and a new trial had, on the ground of a misdirection by the learned Judge to the Jury. He submitted that it should have been left to them to say, whether the accident arose from the negligence of the coachman, or whether it was not rather attributable to misadventure. If it had been shewn that the coachman had received any previous notice of the cottage having been pulled down, the case would have been different; but, as he was not aware of it, no imputa-

tion could be cast on him; and the accident was unavoidable. The law makes a wide distinction between carriers of goods, and the owners of stage-coaches for the conveyance of passengers. The former are in the nature of insurers, and, as common carriers, are answerable in all cases, unless a loss happen by the act of God, or of the King's enemies; whilst the latter are not even subject to the rule of the road, nor liable unless in cases of actual negligence. In *Aston v. Heaven* (a), Lord Chief Justice *Eyre* held that coach-owners are not liable for injuries happening to passengers from accident or misfortune, where there has been no negligence or default in the driver; and that, where there is no other carriage on the road, the driver may keep in the middle, and is not bound to keep on the left-hand side of the road, although the accident might have proceeded from the coach not being on the proper side. Here, there was no want of caution on the part of the coachman; much less can negligence be imputed to him. If the master of a ship steer her according to a sea-mark, and, such mark being altered or removed without his knowledge, he in consequence strike on a rock or shoal, negligence cannot be imputed to him. In *Christie v. Griggs* (b), Sir *James Mansfield* held that the proprietor of a stage-coach is not answerable for any damage that may happen to a passenger from the coach being overturned by a mere accident; and his Lordship said, that, on a contract to carry passengers, the carrier did not warrant their safety; his undertaking as to them went no farther than this—that, as far as human care and foresight could go, he would provide for their safe conveyance. So, here, the overturning of the coach was purely accidental, as the coachman had no means of ascertaining that the cottage had been pulled down since he passed by it on his last journey.

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(a) 2 Esp. N. P. C. 533.

(b) 2 Camp. 79.

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Mr. Serjeant *Onslow*, and Mr. Serjeant *Taddy*, now shewed cause.—There is not the slightest pretence for saying that the Jury were misdirected. The opinion of the learned Judge was perfectly correct. The coachman ought to have kept in the middle of the road, and should not have gone so far to the right as it seems he did. At all events, he did not preserve a prudent course. In *Mayhew v. Boyce* (a), Lord *Ellenborough* held, that, where the driver of a carriage on a public road may adopt either of two courses, one of which is safe, and the other hazardous, if he elect the latter, he is responsible for the mischief that may ensue; and he cannot in such case insist upon the fact that he kept to his own side of the road; “For,” said his Lordship, “if it be practicable to pursue a course which is safe, and you follow so closely upon the track of another that mischief may ensue, you are bound to adopt the safe course;” and here the coachman actually drove the coach out of the boundary of the road, although it was a moon-light night, and there was nothing to prevent him from passing in the centre, or even diverging to the left-hand side. The Jury were put in possession of all the facts. It was for them to judge whether the coachman had been guilty of negligence or not; and, as they have found that he did not proceed with a proper degree of caution, their verdict is conclusive, and ought not to be disturbed.

Mr. Serjeant *Wilde*, in support of his rule, was stopped by the Court.

Lord Chief Justice *BEST*.—The principle to be collected from the last case to which we have been referred, is, that, if the driver of a stage-coach do not use a proper degree of caution, or, where there are two ways, he do

(a) 1 Stark. N. P. C. 423.

not adopt that which is safe, he is responsible for any mischief that may ensue from his electing to pursue a hazardous course. Here, the question is, whether the Jury were warranted in finding a verdict against the proprietor of the coach, as it was not left to them to say whether the coachman had been guilty of negligence or not. We are not to ascertain the degree of care that the driver of a coach may be required to exercise: that is a question expressly for a Jury. The declaration charges the defendant in respect of the negligence of his servant; and, if it had been left to the Jury to say whether or not the latter had been guilty of negligence, the case would have been free from difficulty. The coachman should have kept in the road; and I am strongly inclined to think, that, as he went out of it, the Jury were warranted in presuming negligence; but the learned Judge assumed, that, as the coachman had driven out of the road, the plaintiff was entitled to a verdict, whether the former had been guilty of negligence or not. This action clearly could not be maintainable unless negligence had been proved; and, although the coachman might have used competent skill, still an accident might have occurred for which the proprietor would not have been liable: for instance, the horses might have been frightened at the firing of a gun; in which case, if they started or ran off, and overturned the coach, the proprietor would not have been answerable, as he is only responsible for the actual negligence of his coachman or servant in the driving of the coach. Here, the accident might have happened without any negligence on the part of the coachman; for, his having deviated from the road might fairly be attributed to the removal of the cottage by which he had been formerly guided in making the turning. I am therefore of opinion that the rule for a new trial must be made absolute.

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Mr. Justice PARK.—I am of the same opinion. There is a wide distinction between contracts for the conveyance

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of passengers, and those for the conveyance of goods. In the latter the parties are liable at all events, except the goods are destroyed or damaged by the act of God, or the King's enemies; whilst, in the former, they are only responsible to their passengers in cases of express negligence. In this case it was not left to the Jury to say whether the defendant's coachman had been guilty of negligence or not. It appears that a cottage which stood close by the road side had been pulled down since the last time the coachman had passed the spot, which was but a few hours previously to the time of the accident; and that he had no knowledge of its removal. If it had been pulled down a week or a month before, the case would have been different; but he depended on the locality of the cottage for his guide. He probably had no means of knowing that it had been pulled down in the course of the preceding day; and, although the moon was up at the time he passed, he might naturally mistake the cottage that remained for that which had been rased, or he might have supposed that both remained standing as before. At all events, I do not think that such a degree of actual negligence can be imputed to him as to render his master liable in point of law. The question of negligence should certainly have been left to the Jury.

Mr. Justice BURROUGH.—The declaration in this case is founded on a charge of negligence in fact; and it is not for us to judge whether or not the coachman was guilty of such negligence. The rule of the road is no criterion of negligence (a); and it was matter of evidence whether the coachman acted negligently or not, and should have been left to the Jury. The rule for a new trial must therefore be made—

Absolute.

(a) See *Wayde v. Lady Carr*, 2 Dow. & Ryl. 255.

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Monday,
Nov. 28th.

FRANCES HENRIETTA RENNELL, Widow, Administratrix of THOMAS RENNELL, Clerk, *v.* GEORGE, Bishop of LINCOLN, THOMAS HENRY MIREHOUSE, Clerk, and WILLIAM SQUIRE MIREHOUSE, Clerk.

THIS was a *quare impedit*. The declaration stated, that the defendants were summoned to answer the plaintiff, relict and administratrix of all and singular the goods, chattels, and credits, which were of *Thomas Rennell*, Clerk, Bachelor in Divinity, deceased, at the time of his death, who died intestate, of a plea that they permit the plaintiff to present a fit person to the rectory of the parish church of *Welby*, in the county of *Lincoln*, which was vacant, and in her gift as administratrix as aforesaid, and whereupon the plaintiff, by her attorney complained;—For that whereas one *William Dodwell*, Clerk, Doctor in Divinity, late prebendary of the prebend or canonry of *South Grantham*, founded in the cathedral church of *Salisbury*, theretofore, to wit, on the 27th October, 1775, to wit, at *Boston*, in the county of *Lincoln*, was seised of and in the said prebend or canonry, with its appurtenances (to which prebend or canonry the advowson of the said rectory of the parish church of *Welby*, with its appurtenances, then belonged and still belongs), in his demesne as of fee, in right of the said prebend or canonry; and the said *William Dodwell*, D. D., so being such prebendary as aforesaid, and so being seised of and in the said prebend or canonry, with its appurtenances, to which &c., afterwards, to wit, on the day and year aforesaid, at &c. aforesaid, presented to the said church of *Welby*, being then vacant, one *William Dodwell*, Master of Arts, his clerk, who, on the said presentation of the said *William Dodwell*, D. D., was admitted, instituted, and inducted into the same, in the time of peace, in the time of our sovereign Lord *George the Third*, late King of *Great Britain*: and the plaintiff further

Where a prebendary, having the advowson of a rectory in right of his prebend, dies while the church is vacant, without having presented:—*Held*, that the right to present is in the succeeding prebendary, and does not pass to the personal representative of the deceased.

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said, that the said *William Dodwell*, D. D., being so seised of the said prebend or canonry, with its appurtenances, to which &c., in his demesne as of fee, in right of the said prebend or canonry, he, the said *William Dodwell*, D. D., afterwards, to wit, on the 1st of *October*, 1785, to wit, at *Boston*, &c., died so seised; after whose death, to wit, on the 29th *October*, in the year last aforesaid, to wit, at *Boston*, &c., one *Robert Price*, clerk, was lawfully admitted, instituted, and inducted prebendary of the said prebend or canonry, with its appurtenances, to which &c.; whereby the said *Robert Price* then and there became and was seised of and in the said prebend or canonry, with its appurtenances, to which &c., in his demesne as of fee, in right of the said prebend or canonry: and the plaintiff further said, that, the said *Robert Price* being so seised of and in the said prebend or canonry, with its appurtenances, to which &c., in his demesne as of fee, in right of the said prebend or canonry, he, the said *Robert Price*, afterwards, to wit, on the 1st of *April*, 1823, at *Boston*, &c., died so seised; after whose death, to wit, on the 23rd *April* in the year last aforesaid, at *Boston*, &c., the said *Thomas Rennell* was lawfully admitted, instituted, and inducted prebendary of the said prebend or canonry, with its appurtenances, to which &c., whereby the said *Thomas Rennell* then and there became and was seised of and in the said prebend or canonry, with its appurtenances, to which &c., in his demesne as of fee, in right of the said prebend or canonry; and, the said *Thomas Rennell* being so seised, the said church afterwards, to wit, on the 1st of *June*, 1824, at *Boston* &c., became vacant by the death of the said Reverend *William Dodwell*, Clerk, the late parson and incumbent thereof, and still is vacant, whereby it then and there belonged to the said *Thomas Rennell* to present a fit person to the said rectory of the said parish church, so being vacant as aforesaid: and the plaintiff further said, that, afterwards, and whilst the said church was so vacant as aforesaid, to

wit, on the 30th of *June*, in the year last aforesaid, at *Boston &c.*, the said *Thomas Rennell* died intestate, so seised of and in the said prebend or canonry, with its appurtenances, to which &c., in his demesne as of fee, in right of the said prebend or canonry, without having presented any person to the said rectory of the said parish church; after whose death, and whilst the said church was so vacant as aforesaid, to wit, on the 22d *July* in the year last aforesaid, at *Boston &c.*, administration of all and singular the goods, chattels, and credits, which were of the said *Thomas Rennell*, deceased, at the time of his death, who died intestate, by the Right Reverend Father in God, *Charles*, by Divine Providence, Archbishop of *Canterbury*, Primate of all *England*, and Metropolitan, was in due form of law granted to the plaintiff; whereupon and whereby it then and there belonged and now belongs to the plaintiff, as administratrix as aforesaid, to present a fit person to the said rectory of the said parish church, so being vacant as aforesaid, and which is still vacant; but the said Bishop of *Lincoln*, and the said *T. H. Mirehouse*, and *W. S. Mirehouse* unjustly hindered her from presenting a fit person to the said rectory of the said parish church, whereupon the plaintiff, administratrix as aforesaid, said, that she was injured, and had sustained damage to the value of 1000*l.*; and therefore, &c. The declaration concluded with a *profert in curiam* of the letters of administration.

The first defendant, as Bishop of *Lincoln*, pleaded, — “That the said rectory of the parish church of *Welby* is within his diocese of *Lincoln*, and that he hath nothing nor doth he claim to have anything in the said rectory of the church aforesaid, or in the advowson of the same, except only the admission, institution, and induction, of the rectors to the same rectory and parish church, and all such other things as belong to the Ordinary as Ordinary of that place; and this he is ready to verify: wherefore he prays judgment,

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if the plaintiff, without assigning some special disturbance in the person of him, the said Bishop, ought to have or maintain her said action against him &c.”

The other defendants, *Thomas Henry Mirehouse*, and *William Squire Mirehouse*, pleaded, that the plaintiff ought not to have or maintain her said action against them, because they said, that, after the said *Thomas Rennell* had so died without having presented any person to the said rectory of the said parish church, and whilst the said church was so vacant as aforesaid, to wit, on the 19th of *July* in the year last aforesaid, at *Boston &c.*, the said defendant *Thomas Henry Mirehouse* was lawfully admitted, instituted, and inducted, prebendary of the said prebend or canonry, with its appurtenances, to which said prebend or canonry the said advowson, with its appurtenances, then belonged and still belongs, whereby he, the said *Thomas Henry Mirehouse*, then and there became and was seised of and in the said prebend or canonry, with its appurtenances, to which &c., in his demesne as of fee, in right of the said prebend or canonry, and whereby it then and there belonged to him to present a fit person to the said rectory, so being vacant as aforesaid: and the defendants, *Thomas Henry Mirehouse*, and *William Squire Mirehouse*, further said, that he, the said *Thomas Henry Mirehouse*, so being such prebendary as aforesaid, and so being seised of and in the said prebend or canonry, with its appurtenances, to which &c., afterwards, to wit, on the 26th of *September*, in the year last aforesaid, at *Boston &c.*, presented to the said church of *Welby*, then being vacant, the said defendant *William Squire Mirehouse*, his clerk, for the purpose of his being admitted, instituted, and inducted into the same, but which said admission, institution, and induction, had been hindered and prevented by his Majesty's writ of *ne admittas*, to the said defendant Lord Bishop of *Lincoln* in that behalf directed; for which reason the said *Thomas Henry Mirehouse* had prevented the plaintiff from pre-

senting a fit person to the said church: and this they, the said *Thomas Henry Mirehouse*, and *William Squire Mirehouse*, were ready to verify; wherefore they prayed judgment if the plaintiff ought to have or maintain her aforesaid action thereof against them &c.; and they also thereupon prayed a writ to the said Bishop, &c.

The plaintiff, as to the plea of the said Bishop (inasmuch as he had not nor claimed to have anything in the church aforesaid, or in the advowson of the same, except only the admission, institution, and induction, of the rectors to the same rectory and parish church, and all such other things as belong to the Ordinary as Ordinary of that place) prayed judgment against the said Bishop, and a writ to the said Bishop, &c.; therefore, it is considered that the plaintiff recover against the said Bishop her presentation to the said church, and that she have a writ to the said Bishop, that, notwithstanding his disclaimer, he admit a fit person to the said church on the presentation of the plaintiff: and the said Bishop is not amerced because he hath excused himself of any particular disturbance; but let execution thereof be stayed until the said plea between the plaintiff and the said *Thomas Henry Mirehouse* and *William Squire Mirehouse* be determined, &c. The plaintiff then demurred generally to the plea of the other defendants, *Thomas Henry Mirehouse*, and *William Squire Mirehouse*; and they joined in demurrer.

This case was twice argued, *first*, in the last *Hilary* Term, by Mr. Serjeant *Wilde* for the plaintiff, and Mr. Serjeant *Taddy* for the defendants, when the Court took time to consider; and, on the first day of the last *Easter* Term, Lord Chief Justice *Best* directed a second argument, and desired that notice thereof might be given to the *Attorney-General*, as the interest of the Crown might intervene, and under the circumstances, the Crown might be deemed entitled to present. The case was accordingly re-argued at considerable length, in the course of the last Term, by Mr.

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Serjeant *Vaughan* for the plaintiff, Mr. Serjeant *D'Oyley* for the defendants, and Mr. Serjeant *Bosanquet*, as representing the *Attorney-General*, on behalf of the Crown. The Court again took time to consider; and, as each of the Judges, in delivering their opinions *seriatim*, very fully commented on every branch of both arguments, it is only necessary to advert to the principal points respectively raised for the plaintiff and defendants, and to refer to the cases and authorities which were cited and relied on in their support.

For the plaintiff, it was contended—*First*, that, in the case of a lay patron, if a presentative church fall vacant, and such patron die without presenting, his personal representative shall present; because, as soon as a church becomes vacant, the next turn is a chattel, and, as such, vests in the person of the individual to whom the advowson at the moment belongs;—*Secondly*, that the character of the party into whose hands a chattel falls, cannot alter the nature of the interest;—and *Lastly*, that such interest cannot go in succession, to the heir of the patron, or to the next owner of the advowson, but belongs to the party in whose time the vacancy happens, or to his executor or administrator (a).

(a) The authorities cited for the plaintiff were—Fitzherbert's *Natura Brevium*, tit. *Quare Impedit*, 33 N, P, 34 B, N.—Brooke's *Abridgment*, part 2, tit. *Presentation al' Eglise*, pl. 22.—Rolle's *Abridgment*, Vol. 2, tit. *Presentment* F. 346, pl. 4.—Viner's *Abridgment*, tit. *Corporations* L., *Executor* U. 17, *Presentation*, (F a).—Mallory's *Quare Impedit*, tit. *Presentations* 69.—Coyns's *Digest*, tit. *Eglise* (H. 6.)—Selden's *Works*, Vol. 6, p. 2063, tit. *Prerogative*.—Gibson's *Codex*, 797.—Blackstone's Com-

mentaries, Vol. 1, p. 389.—Coke *Littleton*, [9. a.] [15. b.] [46. b.] [90. a.] [388. a.]—Hargrave & Butler's *Notes*, [N. 47.] [N. 85.]—Sheppard's *Epitomie*, tit. *Chattels*, 243, 244.—Wentworth on *Executors*, 54, 73, 259.—Winch, 741.—Johnson's *Dictionary*, *Prerogative*.—Statutes 21 Hen. 7, c. 21; 28 Hen. 8, c. 11, s. 3; 13 & 14 Car. 2, c. 4, s. 14.—Year Books, 34 Hen. 6, fol. 27, pl. 8; 19 Edw. 2.—*Overton v. Syddall*, Coke's *Entries*, 122.—The case of *The Dean & Chapter of Norwich*, 3 Rep. 73.—*Fulwood's case*, 4 Rep.

For the defendants, it was insisted (a),—*First*, that there was a manifest distinction between ecclesiastical patronage in spiritual hands, and that in lay hands, the spiritual patron having only a trust to be exercised for the benefit of the public at large, and his patronage being never sold or granted away until the avoidance happens, whilst the lay patron has an interest of profit as well as of trust;—*Secondly*, that, as in the declaration the plaintiff's intestate was alleged to be seised in right of his prebend, the presentation ought to be in the same right;—*Thirdly*, that there was a further distinction where the patron is also incumbent;—*Fourthly*, that, though a lay patron might grant an advowson or next presentation, a spiritual patron had never

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65.—*Smallwood v. Bishop of Coventry and Litchfield and Walter, Saville*, 118.—*The Queen's, Fane's, and Archbishop of Canterbury's case*, 4 Leon. 107, 109.—*John London v. The Chapter of the Collegiate Church of Southwell*, Hob. 303.—*Holland v. Shelly*, Hobart, 302; S. C. nomine *Holland v. Chichester, Bishop*, Winch's Entries, 692.—*Stephens v. Wall*, Dyer, Edit. 1794, 282 b, pl. 28.—*Potter v. Chapman*, Ambler, 98, 101.

(a) The authorities cited for the defendants were—Fitzherbert's *Natura Brevium*, tit. *Quare Impedit*, 33 B, N, P, 34 O.—Viner's *Abridgment*, tit. *Presentation*, D.—Malory's *Quare Impedit*, 69.—Gibson's *Codex*, 115, cited in Burn's *Ecclesiastical Law*, 7th Edit. tit. *Bishop*, 239.—Gibson, 757, 758, 759, 763.—Coke Littleton, [17. b.], [131. a.], Sect. 644., [340. b.], [341. a.], [388. a.].—Watson's *Clergyman's Law*, Edit. 1725, pp. 76, 77, 82, 106, 224, 225.—Sta-

tutes, 25 Edw. 3, stat. 6; 32 Hen. 8, c. 28, s. 1.—Year Books, 9 Hen. 6, fol. 33; 4 Edw. 3, fol. 2, pl. 3; 29 Edw. 3, fol. 3, 7; 8 Edw. 3, fol. 58, pl. 13; 21 Hen. 7, fol. 8.—*Dean and Chapter of Norwich's case*, 3 Rep. 75 b.—*Caodrey's case*, 5 Rep. 1, 4, 8.—*Sutton Hospital's case*, 10 Rep. 28.—*Brokesby v. Wickham and Lincoln, Bishop*, 1 Leon. 167.—*Holt v. Coventry and Litchfield, Bishop*, Hobart, 140.—*Mackenzie v. Robinson*, 3 Atk. 559.—*Repington v. Tamworth School, Governors*, 2 Wils. 150.

For the Crown.—Brooke's *Abridgment*, tit. *Issues retournes sur terres, &c.* pl. 21.—Rolle's *Abridgment*, Vol. 2, tit. *Presentment al' Eglise*, C. 343.—Viner's *Abridgment*, tit. *Presentation*, E.—*Liber Parl.* 21 Edw. 1; 24 Edw. 3, 30.—Coke Littleton, [90. a.], [388. a.]—Godolphin, 264, 278.—Ambler, 98, 101.—*Holland v. Shelly*, Hobart, 302.

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exercised such a right;—and *Lastly*, that, where a bishop is patron, and entitled to a living in right of his see, and the church becomes void, and the bishop dies after the vacancy and before it is filled up, then the King, by virtue of his prerogative, takes the turn as guardian of the temporalities of the bishopric, and presents, and not the executors of the bishop.

Mr. Justice GASELEE.—This is a *Quare Impedit*, brought by the administratrix of the late prebendary of *South Grantham*, in the cathedral church of *Salisbury*, against the three defendants, to recover the presentation to the rectory of the parish church of *Welby*, in the county and diocese of *Lincoln*, the advowson of which belongs to the prebend of *South Grantham*, and which became vacant in the life-time of the intestate, the late prebendary.

The declaration states the seisin of one *William Dodwell* of the prebend to which the advowson belongs, in his demesne as of fee, in right of the said prebend,—his presentation of a clerk, who was admitted, instituted, and inducted,—the death of the prebendary,—and the admission, institution, and induction of *Robert Price* to the prebend,—the death of *Price*,—and the admission, institution, and induction of the intestate,—the death of the incumbent, whereby it belonged to the intestate to present,—the death of the intestate pending the vacancy,—and administration granted to the plaintiff, whereby she is entitled to present: but that the defendants hinder her.

The first defendant, the bishop, pleads the usual plea, that he claims nothing but as ordinary; and there is judgment against him, with a *cesset executio* in the usual form.

The other defendants plead, that, after the death of the intestate, and whilst the church continued vacant, one of them was duly admitted, instituted, and inducted to the prebend, whereby it belonged to him to present to the rectory; that he accordingly presented the other, whose ad-

mittance has been prevented by a writ of *ne admittas*, directed to the bishop.

To this plea the plaintiff has demurred generally, and the defendants have joined in demurrer.

The case was first argued in *Hilary* Term last, when, it appearing to the Court that a question might be made, whether, under the circumstances, the Crown was not entitled to present to the vacant living, it was directed that the case should be argued a second time, and notice given to the Attorney-General, that he might interpose if he thought fit, for the interest of the Crown. The case was accordingly argued a second time, in the last term, not only by the counsel for the respective parties to the record, but also by my brother *Bosanquet* on the part of the Crown; and it now stands for the judgment of the Court.

The material question which it is necessary for the Court to decide *upon this record*, is, whether the plaintiff has made out her title to present; for, if she has not, it is immaterial, as to this action, who is entitled; as any decision of the Court upon the title of any other parties would not be binding. The question is a new one; for, notwithstanding all the industry that has been exerted by the several counsel by whom the case has been argued, and by those by whom it is to be decided, no case similar to it has been found in the books; and, although one would think that the case must have happened in many instances, none have been discovered. In support of the affirmative of the question, the plaintiff must make out that the right of presentation to a presentative living, the patron of which is entitled to the advowson in right of an ecclesiastical preferment, and the vacancy in which happens in the lifetime of the patron, is a chattel severed from the inheritance, and, in the event of the death of the patron before the vacancy is filled up, belongs to his personal representative, in the same manner as it would have done had

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he been seised of the advowson in respect of any temporal property. I use the term *presentative* living, because it has been decided in this Court, in the case of *Repington v. The Governors of Tamworth School* (a), after two arguments, that, in the case of a *donative*, the right of donation descends to the heir, and that the executor has no title, which he would have had, had it been a *presentative* benefice. I could have much wished for a fuller report of that case than is to be found in the very short statement of it in *Wilson*, in which neither the arguments of counsel nor the grounds of the decision are mentioned; nor do I find any other authority upon the point. I have seen the declaration, which stated that one *Sebright* was seised of the advowson and donation of the vicarage, in gross by itself, as of fee and right; which said vicarage had been immemorially a donative, by prescription, in *Sebright*, and all those whose estate &c., upon a vacancy, to give such vicarage to such person as they should think proper, to be held during his life. It then deduced the title to the plaintiff's testator, shewing the vacancy to have happened in his life-time, and to have continued until and at his death, whereby it belonged to the plaintiff to present. I do not find what the plea was, but, whatever it was, the argument appears to have been in arrest of judgment.

It seems that originally the right of presentation to all churches was in the bishops; and perhaps it is not easy to ascertain precisely at what period any alteration happened in that respect. It appears, however, to have taken place at a very considerable time back; and the origin of it is thus accounted for by Lord *Coke* (b), *viz.* "Advowson, *Advocatio*, so called, because the right of presenting to the church was first gained by such as were founders, benefactors, or maintainers of the church, *viz. ratione fundationis*, as, where the ancestor was founder of

(a) 2 Wils. 150.

(b) 1 Inst. 119 b.

the church; or, *ratione donationis*, where he endowed the church; or, *ratione fundi*, where he gave the soil whereupon the church was built;" and *Gibson* says (a), "Although the nomination of fit persons to officiate throughout the diocese was originally in the Bishop and in none else, yet, when lords of manors were willing to build churches, and to endow them with manse and glebe, for the accommodation of fixed and residing ministers, the bishops, on their part (for the encouragement of such pious undertakings), were content to let those lords have the nomination of persons to the churches so built and endowed by them; with reservation to themselves of an entire right to judge of the fitness of the persons so nominated: and what was the practice, became, in process of time, *the law* of the church." The general rule is admitted, that, if one be seised of an advowson in fee, and the church become void, the void turn is a chattel; and, if the patron die before he presents, the avoidance doth not go to his heir, but to his executor: and to such an extent is the doctrine of the void turn being considered as a chattel, and severed from the inheritance, carried, that it is held, that, where a wife is seised of an advowson, and, the church being void, dies without having had issue, so that the husband is not tenant by the curtesy, still the husband shall present to the void turn (b). And, where the husband is tenant by the curtesy, and the church becomes void during his life, and he dies before it is filled up, yet the heir shall not have the turn, but the husband's executors. And so is the law in most cases where the interest determines after the church is void, and before presentment; *per Finch*, 38 *Edw.* 3, 36; *Brooke's Abridgment*, tit. *Presentation al' Esglise*, 18, 21; 21 *Hen.* 6, 56. There are other authorities in which the void turn is stated to be a chattel. In *Fitzherbert's Natura Brevium*, it is said (c), "If a vicarage happen void, and before

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the parson present, he is made a bishop, &c., yet he shall present unto this vicarage, because it was a chattel vested in him." In *The Queen's* and the Archbishop of *Canterbury's* case (a), Mr. Justice *Periam* said: "This interest is a chattel; for, if the church become void, and before presentment the patron dieth, his executors shall have the presentment, for that it was a chattel vested in their testator."

It is said that there are some exceptions to the general rule of the executor being entitled to present. One is, where the patron is also the incumbent, as in the case of *Holt v. The Bishop of Winchester* (b), where one and the same person being parson of the church, and seised in fee of the advowson, died, and it was objected that the advowson did not descend to the heir until after the death of the ancestor, and that, by the death of the ancestor, the church was void, and the avoidance thereby severed and vested in the executor; but the Court, upon the first argument, held and adjudged that the heir should have it, for the descent to the heir, and the fall of the avoidance to the executor, happened all in one instant; and where two titles concur in the same instant, the elder right shall be preferred, as is the case of joint-tenants, where one devises his part, if the title of the devisee and of the survivor fall in the same instant, the title of the survivor, being the elder right, shall be preferred.

Another exception is, where the patron is a bishop, and entitled to the living in right of his see. There, if the bishop die after the vacancy, and before it is filled up, the King, and not the executors of the bishop, shall present. And this was urged by the counsel for the defendants, if not as an authority in favour of the new prebendary, yet against the right of the plaintiff, which will equally answer their purpose in this action. Various reasons are assigned in the books for this. In *Coke Little-*

(a) 4 Leon. 109.

(b) 3 Lev. 47.

ton (a), it is said, that, "if a church become void in the life of a bishop, and so remain until after his decease, the King shall present thereunto, and not the executor or administrator; for nothing can be taken for a presentment, and therefore it is no assets." This, however, cannot be the reason; for, if it were, it would apply to every case, even the admitted one of a lay patron, in which it might be said that the executor is not entitled to the presentation, for nothing can be taken for it, and consequently it is worth nothing, and therefore no assets. There are however contradictory *dicta* as to value. In *Hobart* (a), it is said, that an advowson may be yielded in value upon a voucher, and may be assets in the hand of an executor. So, in 39 *Hen. 6*, where the king granted that monks should have all their possessions of the abbey in the vacation, for their sustentation, it was ruled, that they should not have the advowsons, because no sustentation arose from them.

It has also been argued that the presentation is a spiritual trust, and, consequently, on the vacancy of the see, vested in the King as the supreme patron and head of the church. If this were so, would not the guardian of the spiritualties of the vacant see be the proper person to present? or, if the see should be filled up before the presentation, would not the new bishop be entitled to it? But, on the contrary, the authorities shew that it is considered as part of the temporalties; that the King takes it as such; that it passes to a third person by a grant of the temporalties; and that, although the church remains void not only until after the consecration of the new bishop, but after the restitution of the temporalties of the see, the vacancy is still to be supplied by the King or his grantee, and not by the new bishop. Surely nothing can be more conclusive to shew it to be a temporal chattel, and completely severed from the advowson. There is a passage

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in *Watson's Clergyman's Law* (a), which shews very clearly the rights of the Crown on this subject. It is thus: "But, in the case of a bishop, the void turn of a church, the advowson whereof he is seised in the right of his bishopric, by his death doth not go to his executor; but, when the temporalities of the bishopric are seized into the King's hands, the King doth not only present to such benefices as become void during the seizure, 18 *Edw. 3.* 31 b; 21 *E. 3.* 5 a, 29 a, 30 a; 24 *E. 3.* 26; 5 *E. 2.* *Fitz. Quare Impedit*, 165; 19 *E. 2.* *Quare Impedit*, 178; and as were void after the death of the bishop, and before the seizure, 12 *E. 3.* *Fitz. Quare Impedit*, 56, by *Shard*; but also of all such as were void when the bishop died, 50 *E. 3.* 26; 9 *Hen. 6.* 16 b.—*Admitt.* 24 *E. 3.* 26; *Lib. Parl.* 21 *E. 1.*; *Prior de Bermondsea's* case, 24 *E. 3.* 30; 1 *Inst.* 90 b, 388 a. Yea, and to such to which the bishop had at any time presented or collated, if his clerks had not taken as well induction as institution or collation before the bishop's death, because nothing but induction fills the church against the King, *Liber Parliamentorum*, 21 *E. 1.*; the *Prior of Bermondsea's* case, adjudged in *Parl.* 24 *E. 3.* 30; 11 *H. 4.* 9 a; *Fitz. N. B.* 34 K, 36 K; 38 *E. 3.* 3 and 4; *Hobart's Rep.* 208: much more to such to which the bishop had only presented, and to which his clerk was not instituted, 44 *E. 3.* 3; and if the bishop doth die the same day after induction, the King is not barred, 44 *E. 3.* 3; yea, and whether the King doth of grace grant the temporalities before consecration, or livery of them be sued out of the King's hands afterwards by the successor, the King, though he hath not then presented to such benefice, the right of presenting to which came to him by reason thereof, may, at any time afterwards, present to the same, 18 *E. 3.* 1 a; 24 *E. 3.* 26 b." In *Fitzherbert's Natura Brevium* (b), it is said, "If the king have an advowson by reason of


(a) 3d Edit. c. 9, page 77.

(b) Page 33 N.

the temporalities of a bishop, and during the avoidance the king restore the bishop the temporalities, yet he shall present unto the advowson, and not the bishop, for this avoidance." So, again (a), "If the King grant unto an abbot and his successors, that the monks shall have the temporalities during the vacation; now, if the advowson happen void during the vacation, the monks shall present to the same, *Mich. 30 Edw. 3; 17 Edw. 3, 51.*

In *Rolle's Abridgment* it is said (b), "if the King has an advowson by reason of a wardship, and grants it to another during the minority of the ward, and after the church becomes void, and continues void until the full age of the ward, whereby the estate of the grantee is determined, yet the grantee shall have the presentment, and not the King: *contra 29 E. 3, 8 b, admitt. per issue.*" In *Coke Littleton*, it is said, on the other hand (c), that "guardian in socage shall not present to an advowson, because he can take nothing for it; and by consequence he cannot account for it: and, by the law, he can meddle with nothing that he cannot account for."

In the case of *The Dean and Chapter of Hereford v. The Bishop of Hereford and Ballard* (d), the Court held the next avoidance of a church not to be a thing whereof any profit could be made, or any rent reserved. The authorities, therefore, with respect to the value, are contradictory; and it is difficult to reconcile this doctrine of advowsons and grants of next avoidances not being worth any thing, with the practice of the present day; for it is quite clear, that, not only at this day, but for a considerable period, advowsons and grants of next presentations are and have been matters of merchandize; as indeed Bishop *Gibson* admits to be the case, though he complains very much of it, as contrary not only to the nature of advowsons—which he says are merely a trust vested in the

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(a) Fitz. Nat. Brev. 33 V.

(b) Page 245.

(c) 17 b.

(d) Cro. Eliz. 440.

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hands of patrons, by consent of the bishop, for the good of the church and religion—but also to the express letter of the canon law, the rule of which is, that the right of patronage, being annexed to the spirituality, cannot be bought and sold. At what period advowsons and next presentations began to be considered saleable, it is not easy to ascertain; but it seems that presentations were considered valuable in the time of *Edward the First*; for, in the 13th year of his reign, damages were given in *Quare Impedit* to the amount of two years' value, or a half year's value of the church, according to the length of time of the disturbance, and to the circumstance of the patron having thereby lost his presentation for that time or not: and before the statute 12 *Anne*, the practice of selling them was quite common, insomuch that it was thought necessary to restrain it by an act of Parliament, not generally, but only in the case of the clergy purchasing for their own benefit.

It is not necessary to trouble the Court with the words of that statute; but Doctor *Burn* makes this observation upon it: "This act being only restrictive upon clergymen, all other persons may continue to purchase next avoidances as they did before, and present thereunto as they think proper." Another observation may also be made on that act of Parliament, which is, that it only attaches on the purchaser of the presentation being himself admitted to it; because, looking at the different provisions of the act, it is only in case any person shall so purchase, and shall be thereunto presented and admitted.

It is said, that in case of a lay patronage, the church is secure from an improper person being presented, by the bishop's right to refuse the party presented.

The same protection is afforded in this case. The administratrix only claims to *present*. The Bishop of *Lincoln* is to judge of the fitness of the person presented. So it is in all cases of ecclesiastical patronage, except in the case of a bishop collating to preferment within his own diocese. It is so with the options of an archbishop; with

respect to which it is to be observed that they are to all purposes considered as chattels, and his personal property. He may devise them by his will; and, if he do not devise them, they pass to his executor or administrator: they are not considered as belonging to the see, and seizable by the King, amongst the other temporalities belonging to it. The case of options, also, is an answer to a distinction which has been attempted to be made between ecclesiastical and lay patronage—that the former is never sold, or granted away, or disposed of, until the avoidance actually happens; for the subject of the option is granted at the very instant of the bishop's appointment to the see; and, although it is not to be supposed that the archbishop would make it an object of sale, yet if it should happen that he should die intestate, and a creditor take out administration, what is there to restrain the administrator from selling the options before the vacancies happen; or, indeed, in a common case, to prevent a residuary legatee, or one of the next of kin, from calling upon the executor or administrator to do so. This inconvenience cannot arise here; for, the vacancy having happened, the void turn cannot be sold. I mention the case of options, to shew, that, amongst the highest dignitaries of the church, there does not appear to be any apprehension of danger in permitting a presentation to fall into the hands of an executor. I do not mention it as a case which has hitherto received any express judicial sanction. It is certainly not altogether conformable to the antient custom, as set out in the grant of an option in the Appendix to *Gibson* (a), where it is stated to be an ancient and immemorial user for the archbishop to name a fit clerk to the new bishop, for whom the new bishop was to provide, *quamprimum facultas se obtulerit*—as soon as he could—from the members; and in the mean time he was to take care of him, and provide him with a pension and other things.

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Archbishop *Cranmer* appears to have been the first who adopted the present course.

That the law has no apprehension of any danger from the presentation falling into the hands of an executor, is clear from the daily sanction it gives to the grant of next presentations, in all which, if the grantee die before the church avoids, the presentation falls to the executor or administrator, and by the allowing an executor or administrator to maintain a *Quare Impedit* in his own name. In one of the cases I have met with, the name of which I do not remember, if my recollection is accurate, a question was made, whether the executor could complain of the disturbance in the testator's time, as well as his own; which was determined in the affirmative. I am not aware of any instance, in modern times at least, of any ecclesiastical patron having sold the next presentation of any living to which he was entitled in respect of his ecclesiastical preferment. In addition to the improbability of his doing so, the uncertainty of the grant's taking effect by the vacancy happening in the life-time of the grantor, would of course render it not frequent; but, were it to be done, and the avoidance happen in his life-time, I am not aware of any authority which has said that he would not be bound by his own grant, although he cannot bind his successor. On the contrary, it is stated in *Watson* (a), that the grant by a bishop of the advowson of an archdeaconry for twenty-one years, although void against his successors and the King, is good against himself; so that *he* cannot avoid it during the time he continues bishop. So also, grants by dean and chapter become void when the dean dies, but bind both dean and chapter during the life-time of the dean. For this he cites *Hunt v. Singleton* (b), and *Rickman v. Garth* (c). That such grants have been made in earlier times, appears from many precedents to be found in the books of entries.

(a) Page 85.

(b) Cited in *Lincoln College's case*, 3 Rep. 60.

(c) 2 Cro. 173.

In *The King v. The Abbot of ——— and another (a)*, the declaration stated the seisin of a former abbot of the vicarage of the church of *K.*, who presented ———, — the death of that abbot, and the election of a successor,—the abbot and convent granted the next presentation to *T. B.*, —a writ of attainst against *T. B.*, who was outlawed,—the death of the incumbent during the outlawry, whereby it belonged to the King to present.

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In *Stanhop v. The Bishop of Lincoln, Williams, and Adamson (b)*,—the declaration stated, that the Prior of *Shelford* was seised of the moiety of the advowson of the church of *Rippingale*, and one Sir *John Denham* of the other moiety, to present by turns,—that, the church being full of one *Brerely*, the prior, with consent, &c., did grant the next avoidance unto *Bryan Higden*, —the dissolution of the priory by the statute 27 *Hen. 8.*,—the grant of the priory, and the moiety of the advowson, by *Henry the Eighth* to Sir *Michael Stanhop* and his wife, and the heirs male of his body,—the death of the incumbent,—and presentation by grantee of next avoidance: upon the death of the second incumbent, the party claiming under *Denham* presented; and, upon the next vacancy, the plaintiff, as heir male of Sir *Michael Stanhop*, presented, and the defendants disturbed. This declaration only states the facts; but the issue was taken upon the grant by *Henry the Eighth*.

In *Webster v. The Archbishop of York, Roo, and Woodroffe (c)*,—archbishop, seised of prebend of *Stillington*, in cathedral church of *St. Peter*, collated *Boxall*,—archbishop deprived,—temporalities came to the Queen,—incumbent deprived,—Queen presented *Atkinson*,—*Yonge* became archbishop, and, in 1st *Mary*, granted to *Geo. Webster* and *John* his son the first and next presentation to the prebend,—confirmed by dean and chapter,—death of *Atkinson*,—belongs to plaintiff to present—*Imparlance*.

(a) Lib Int. 110.

(b) Hob. 237; S. C. Winch's Ent. 825.

(c) Co. Ent. 507.

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Hill v. Bishop of Lincoln and others (a)—Prior of *Sheen*, seised 29 *Hen. 8*,—presented and granted next presentation to *Arthur*.

Bishop of *Bath and Wells (b)*, seised of prebend, collated *W. C.*—bishop granted next presentation to plaintiff,—bishop pleads he does not hinder; and because he does not deny the grant, judgment, with stay of execution,—*venire* to try issue.

Adamson v. Bishop of Lincoln and others (c)—Prior seised,—presented grant of next presentation,—vacancy,—grantee presented,—grant of next presentation,—assigned over grant of second presentation to another,—lease for ninety-nine years,—vacancy,—assignee presented,—vacancy,—second grantee presented,—death of lessee,—vacancy,—executor presented,—death of executor,—his widow, being his executrix, married,—vacancy,—husband presented and died,—wife assigned,—assignee granted next presentation to plaintiff,—vacancy,—defendant hinders,—bishop demurs,—clerk pleads much at length, and traverses the vacancy as alleged,—demurrer to that plea.

Overton v. Syddall (d)—Debt on lease. *Henry Syddall*, prebendary of the prebend of *Terwyn*, in the cathedral church of *Litchfield*, demised to *Henry Syddall*, all the prebend, with lands, &c. (*donatione vicariæ apud Terwyn prædictam ac nominatione et presentatione vicariæ choralis in prædicta cathedrali, exceptis et reservatis*)—confirmed by bishop and dean and chapter,—action by successor for rent,—plea,—assignment.

Byng v. Bishop of Lincoln (e)—*Connam*, prebendary of *Grantham*, seised of the advowson of *D.*, presented *Bally*,—*Connam* died,—*Still* made prebendary,—6th *July, Jac. 1*, grant of next presentation to *Cotton*,—assignment to plaintiff,—death of *Bally*,—defendants hindered,—Plea, before *Connam, Jacob Proctor*, prebendary, presented

(a) Co. Ent. 508.

(b) Rast. Ent. 522.

(c) 2 Brown's Ent. 233.

(d) Co. Ent. 122.

(e) Winch's Ent. 853.

Whitehead, and granted the next presentation to *Powell* and *Blacher*,—confirmed by bishop and dean and chapter,—death of *Powell*,—*Blatcher* died, leaving his son executor,—assignment by executor to *Richard Halsey*,—death of *Proctor*—*Connam* prebendary,—death of *Whitehead*,—*Connam* presented *Bally*,—*Richard Halsey* died,—*John*, his executor,—death of *Bally*,—*John Halsey* presented *Primett*,—Demurrer.

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These cases shew clearly the fact that such grants have been made by bishops, abbots, priors, and prebendaries; and although there does not appear to have been any express decisions upon them, yet, as was said by Mr. Justice *Ashurst* (a), “the form of legal proceedings are evidence of what the law is.” But in the case of *London v. Southwell* (b), where the prebendary of *Normanton*, who, in right of his prebend, was seised of the advowson of a vicarage, demised divers parcels of the prebend, with all commodities, emoluments, profits, and advantages, with the appurtenances to the said prebend appertaining or in any manner belonging, and the question was what passed by the lease,—the Court decided that the advowson did not pass. Why? not because the grant of the advowson by a spiritual person was illegal, but because the words were not sufficient to pass it; for the Court said, “The words are four, *viz.* commodities, emoluments, profits, and advantages, to the prebend belonging; all which four words are of one sense and nature, implying things gainful, which is contrary to the nature of an advowson regularly; yet an advowson may be yielded in value upon a voucher, and may be assets in the hands of an executor.” Surely, if the grant of an advowson by a spiritual person had been wholly void, that would have been a shorter mode of deciding the case. The exception in the case of *Overton v. Syddall*, which is referred to in some of the cases, may afford an inference, that, but for the exception, it would have passed. In the case cited from the old book of entries, it appears

(a) 2 Term Rep. 636.

(b) Hob. 303,—the pleadings in *Winch's Entries*, 810.

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that the king claimed the presentation on account of the outlawry of the grantee.

There is another case of a similar nature, but stronger, inasmuch as it shews the next presentation to be so much a chattel as to pass under a grant of the goods and chattels of felons, persons outlawed &c. The case is, *Holland v. Shelly*, The Bishop of *Chichester*, and *Gibson* (a), The declaration states that *Edward 4* granted to *Mowbrey*, Duke of *Norfolk*, all goods and chattels of felons, fugitives, outlaws, &c., in the rape of *Bramber*,—title brought down to the plaintiff,—Sir *John Shelly*, seised of the advowson, grants next avoidance to *Thomas Shelly*, who was outlawed for debt,—church void, and so belongs to the plaintiff to present. The case turned upon the question, whether the goods and chattels of persons outlawed for any thing except felony, passed—the Court held that they did.

It has been already admitted, that, if the right of presentation on this occasion be not in the plaintiff, it is not material what other person has the right; but, in determining whether or not the plaintiff be entitled, it may be of use to endeavour to ascertain if there be any other person to whom the Court can see clearly that the right of presentation belongs. At present the claims of two persons only have been put forward, viz. the new prebendary, and the King. In favour of the first of these, I can find no authority, either direct or by analogy. If the void turn be a chattel, the authorities are clear, that the successor of a sole corporation cannot take a chattel by succession; and it is as a sole corporation only that the prebendary appears upon this record. The claim of the latter I have already stated to be in my judgment insupportable. But, supposing the plaintiff not to have the right, it may perhaps be contended that the patron of the prebend is entitled; and there is an authority which, if rightly stated in *Rolle's Abridgment*, might have afforded some colour for such a claim. It is there said (b), “ If the parson ought to present to the vicar-

(a) Hob. 302,—the pleadings in *Winch's Entries*, 692.

(b) Vol. 2, 346.

age, yet if the vicarage become void during the vacancy of the parsonage, the patron of the parsonage shall present." But, on referring to the authority cited in *Rolle, M. 19 E. 2. Quare Impedit*, 178, it appears that the claim by the Crown is on the ground of this vacancy happening during the seizure of the temporalties of the priory. In the present case, however, if such claim were valid, we should probably have heard it made by the learned counsel who argued for the Crown; for, in the event which has happened since the church has been vacant, the Crown might set up another title, as part of the temporalties of the Bishop of *Salisbury*, who, according to the general law in *Coke's Reports* (a) is patron of the prebend: though to that I believe there are some exceptions. Another claimant may by possibility be found in the person of the first defendant upon the record, *viz.* the Bishop of *Lincoln*, who, although upon this occasion he has claimed as ordinary only, which he may have done considering the plaintiff entitled, may, if the plaintiff's claim be over-ruled, contend, that, under the circumstances, the presentation in this instance ought to revert to its original channel, and be made by the bishop of the diocese; or, to use the proper ecclesiastical phrase, he ought to be collated to it. Are we prepared to decide in favour of any of these claims? Upon the whole, therefore, there being no authority to take this case out of the general practice with respect to presentative livings, and it appearing that, in fact, grants of next presentations of ecclesiastical patronage have been made and acted upon by the executors of the grantees, I think the safest course is to decide according to that practice; and therefore, upon the best judgment I can form on this record, I am of opinion that the administratrix of the deceased prebendary is entitled to present, and, consequently, that there should be judgment for the plaintiff. I very

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sincerely lament that I feel myself compelled to come to this opinion, not only because I have the misfortune to differ from the rest of the Court, in which case my opinion is always to be distrusted; but also because, advert-
ing to the original institution of prebendal churches, which is treated of at some length in *Burn's Ecclesiastical Law* (a), it is not impossible but that, upon looking to the original foundation of the cathedral church of *Salisbury*, which, as matter of history, may be stated to have been before the time of legal memory, and the various statutes made from time to time by the members of that cathedral, matter may be found which might have warranted a different judgment from that which, upon the present frame of the record, I have felt myself called upon to pronounce.

Mr. Justice BURROUGH.—It frequently happens that different persons come to different conclusions from the same premises. This is the case with me in drawing a different conclusion from that of my brother *Gaselee*. I am of opinion that judgment must be given for the defendants, *Thomas Henry Mirehouse* and *William Squire Mirehouse*. I ground myself on the allegations in the declaration,—that the *late* prebendary, in his life-time and at his death, *was seised* of the prebend or canonry founded in the cathedral church of *Sarum*, with its appurtenances, to which the advowson of the rectory in question is annexed, *in his demesne as of fee and right, in right of the said prebend or canonry*. These are the premises on which I found my opinion. These allegations stand admitted on the record.

This naturally leads to an investigation of the character in law, of the prebendary or canon, of the nature of his prebend, or, in other words of his rights as prebendary or canon, and of what must be taken by us to be meant by *his seisin in his demesne as of fee, in right of his pre-*

(a) Vol. 1, tit. "Appropriation."

bend or canonry. By our known law, a prebendary or canon is an ecclesiastical sole corporation; as such, he can have no heir, he can have no personal representative. As such, his prebendal rights or property cannot go either to his natural heir or to his personal representative. Where must these things go? To his successor. In their corporate capacities, in estimation of law, the predecessor and successor being one, it is a continuance of the same corporate body. This is more visible in an aggregate corporation; when one of the body dies, the body corporate remains. A prebendary or canon is a corporator in two respects. In one respect, as member of the corporation of dean and canons. He is one of the chapter, having *sedem in ecclesia et vocem in capitulo*. He is a corporator sole as prebendary. In every relation in which he stands to the church, he is a corporator. That I might thoroughly understand the question we have to decide, I have looked into the origin of the rights of this particular prebend or canonry. Before the removal of the church of *Salisbury* to the place where it now stands, *Osmund*, Bishop of *Salisbury*, nephew of *William* the Conqueror, by his charter, granted to the church of *Salisbury*, for ever (*amongst other things*), the church of *Grantham*, with the tithes and other things there adjoining. Whilst in this state, the church of *Salisbury*, and that church only, could have the duties of the church of *Grantham* under its care. A copy of this charter is to be found in the evidence book at the church of *Salisbury*, in the registry of that church, and in *Dugdale's Monasticon Anglicanum* (a). It must have been the intention of the founder, that this property should be in the disposition of the church only. In process of time, the property so given by *Osmund* was appropriated in different ways. New prebends were founded in the church, and this and other property apportioned to the prebenda-

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ries and other members of the church. Whether to the bishop, to the dean, to the dean and chapter, or to prebendaries or canons, it is wholly immaterial; they were all corporations of different descriptions, and could only take and hold in their corporate capacities. These corporate capacities exclude the idea of any of the rights going otherwise than in succession. Therefore I presume it is that we find no instance of an heir or personal representative of a sole corporation presenting or claiming to present to any church to which the right of presentation had vested in the corporate character. If one adverts to a lay advowson in fee, appendant or in gross, a manifest distinction is to be perceived; in the former, the party claiming a right to present would allege a seisin in his demesne as of fee; or, in gross, as of fee and right. What is the legal explanation of the word *fee* in such cases? It is *to him and his heirs*. The property is in him in his natural character; the party seised may dispose of it as he pleases. If he die without doing so, it goes to his heir. If a vacancy happen in the ancestor's time, and he die without disposing of it, it is wholly immaterial, in my mode of considering the question, whether it belongs to the heir, or to the executor or administrator, to present. There is no qualification of the seisin in such case. But the prebendary of the prebend of *Grantham*, as appears in the declaration, is seised in his demesne as of fee, in right of his prebend or canonry. It is said, *in his demesne as of fee*. By this, it cannot be intended to mean a seisin *to him and his heirs*: the heir can in no case have it. It must mean, *to him and his successors*. There being so plain a distinction between the case of an ordinary lay patron seised of a lay advowson, and a prebendary seised in his corporate capacity in right of his prebend, it appears that no case of a lay patronage applies to the subject in question. Such a case can only apply by way of analogy. On examination, it is clear the analogy does not hold, and therefore it has no application to this subject. By looking to the fountain head, to the

original grant to the church of *Sarum*, and then tracing the creation of the prebendary with the prebend appropriated, and the annexation of the advowson to the prebend, I feel myself obliged to say that the right to present in the present instance has not been disunited from the prebend. The only case which bears materially on the subject, is that of *Repington v. The Governors of the Free School of Tamworth* (a). I have in my possession a copy of the declaration in that case. It is there stated that *Sebright Repington*, Esq. was seised of the advowson and donation of the vicarage of *Tamworth*, in gross by itself, as of fee and right. The title to the advowson is then derived to *E. Repington*, tenant in tail male. It is then stated, that a vacancy happened, that *E. Repington* died without having given it, and that his executor claimed to give it. There were pleas, and a verdict for the plaintiff. This Court arrested the judgment, saying that the right belonged to the heir, and not to the plaintiff, the executor. The Court said that the executor would have had a title, if it had been a presentative benefice. That declaration is, I admit, a confirmation of the law as it is said to exist, and as it respects lay property. But it is also a confirmation of what I hold to be the law in the present case. You must look back to the origin of the present right, and see what it is. If the founder has placed it in a state to be enjoyed only in one particular form, that form must be adhered to. In the present case, I think the right is annexed to the prebend; and that one who is not clothed with the character of prebendary cannot exercise it. The plaintiff claims as the executrix of a natural person. She does not connect herself with the prebendary in his corporate capacity, to the exclusion of the successor; and, therefore, there must be judgment for the defendants.

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Mr. Justice PARK.—I am of the same opinion with my

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brother *Burrough* (as indeed I have always been since I heard the argument), that judgment must be for the defendants. In this case, it is not absolutely necessary, as my brother *Gaselee* has said, to decide who has the right of presentation to the living in question, although upon that I have a clear opinion, as will appear by the result. The main point is, has the plaintiff established her claim, as administratrix, to the late prebendary of *South Grantham*, in the cathedral church of *Sarum*? I am of opinion that she has not. One thing has been much pressed at the bar, which I think it is wholly unnecessary now to consider, because upon that we are, as I at present believe, all agreed, *viz.* that, in the case of *lay patronage*, in the events which have happened, the executor or administrator would have been entitled to this presentation, and not the heir; because, in *lay patronage*, the church having become vacant in the life-time of the last possessor, the presentation became a chattel, and went to the executor as personal property, and did not any longer remain with the advowson, as a part of the possessions of the heir of the person seised of the advowson; and, in that case, it must be remembered that it is a mere question between the representatives of the same patron. But, in my view of this case, that leaves the point still open, and, as far as my research and reading go, it has never yet *in specie* been decided in the law of *England*. The real question is, whether lay and spiritual patronage are not to be considered as standing upon a very different footing. And if I should have formed a wrong opinion upon this subject, the silence of our books, and even the diligence exerted at the bar having furnished us with no case bearing upon the point, will form no small excuse for those, who, with regard to the interest of the church, think the claim of the plaintiff to be ill founded. That the fact has existed many hundreds of times, no man can doubt, and that ecclesiastics and those who have had to act upon it, must have thought it clear one way or the other cannot be questioned, and therefore

I apprehend it is that we find no decision upon it. How they have thought, I do not inquire; for we must act for ourselves: though I am induced to say, that, till this claim was set up, no one ever imagined that those rights which a man held *merely jure ecclesiæ*, could be exercised by others after his decease; otherwise, one cannot but think such a claim would have been ascertained by some decision in the course of five or six hundred years, the circumstances having necessarily so often happened. Throughout the whole law of *England*, a distinction prevails between the lay and spiritual character, even the cases and statute just alluded to on the Bench so luminously by my brother *Gaselee*, prove this distinction. Personal rights belong to one of these characters, which do not belong to the other. The transmission of their property stands under different considerations. A person seised of a freehold right is said to be seised in his demesne as of fee; a clergyman, as in this declaration, is said to be seised in his demesne as of fee, in right of his said prebend or canonry. It is very true that many of the evils and absurdities which I contemplate by giving effect to the plaintiff's claim will also arise in lay patronage; because I must admit, that, by giving the presentation to the administrator of a lay patron, it may fall to a very inferior person to present; but that arises out of the unfortunate situation of lay patronage, which I contend ought not to be carried one single point further. What was the origin of lay patronage? It arose in the infancy of society. It arose from this, that, though the nomination of fit persons to officiate throughout the diocese was originally in the bishop, yet when lords of manors of old were willing to build churches, and to endow them with glebes and manses for the accommodation of fixed and resident ministers, the bishops, on their parts, for the encouragement of such pious undertakings, were content that those lords should have the nomination to churches so built and endowed by them; still reserving to themselves the right of

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judging of the fitness of the persons so nominated: and thus arose that constitution of the church, "*Si quis ecclesiam, cum assensu Diocesani, construxit, ex eo jus patronatus acquiritur;*" and hence followed all the consequences of a mere lay possession. Chattels, where chattels, go to the executor; the rights of the heir, to the heir, where, by the common law, those rights would prevail. But still, I ask, do those rules apply to the spiritual patron, and can his rights and properties be dealt with as if he were a private individual? Of this there is no doubt, that in our law (and I hope they ever will) lay and spiritual patronage stand upon a very different footing. The doctrine of the book which has been so often referred to at the bar, I fully adopt, as making a clear distinction between lay and spiritual property. In *Gibson's Codex*, it is decisively marked. For he says (a), "The right or property which the patron hath in an advowson, will not warrant a plea, (as it is in *temporal* property) [and of course *Gibson* is there speaking of spiritual property], that he is seised *in dominico suo ut feodo*, but only, *in feodo*. The reason of which is given by my Lord *Coke* (b), because inheritance, savouring not *de domo*, cannot either serve for the sustentation of him and his household, nor can any thing be received of the same, for defraying of charges; and, in the case of *John London* and the church of *Southwell*, where the words of the lease were, *commodities, emoluments, profits, and advantages* to the prebend belonging, it was adjudged that the advowson could not pass by the said words, because all of them implied things *gainful*, which (as was added) is *contrary to the nature of an advowson, regularly* (c)." Why is all this? It is because, as I say, that an advowson in the hands of a churchman is not a matter of profit, but of naked trust merely; and that the churchman who has an advowson

(a) Second edit. 757.

(b) Co. Litt. 17b.

(c) Hobart, 304.

appendant to an ecclesiastical dignity has it as a mere matter of trust, *in jure ecclesiæ*, which he can only exercise for the benefit and advantage of the church of which he is a member, and of which only as a member of the church could he have a right to dispose. Only as a member of the church of *Salisbury* had Mr. *Rennell* any right; and, the moment he expired, all his right as a member of that church ceased. Am I correct in stating this to be a matter of trust only? for upon that much of the argument in this case has turned. Bishop *Gibson* again says on this subject (a), “Guardian in *socage* shall not present to an advowson, because he can take nothing for it, and by consequence he cannot account for it, and by the law, he can meddle with nothing that he cannot account for. Which said doctrine, and the plain tendency thereof, are exactly agreeable, not only to the nature of advowsons, which are merely *a trust* vested in the hands of patrons, by consent of the bishop, *for the good of the church and religion*, but also to the express letter of the canon law, the rule of which is *Jus patronatus cum sit spirituali annexum, vendi vel emi non potest*. But the notion and practice of making *merchandise* of advowsons and next avoidances, is not so easily reconciled, either to the laws of the church, or to the ancient laws of the land, or to the *nature* of advowsons considered (as they certainly ought in reason and good conscience to be considered) in the nature of *mere trusts* for the benefit of men’s souls: nor does it follow, either from the patrons being *now* vested with that right by the *common law*, or from its being annexed to a *temporal inheritance*, that it is itself a temporal inheritance, or ought (legally speaking) to be considered otherwise than as a *spiritual trust*, since it is certain that the foundation of the right was the consent of the bishop.”—Am I not right then in contending that there is a great difference between lay and spiritual patronage, and that, however the exercise of the right in the

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former case may have so grown up, that it is now difficult, perhaps impossible, to shake it, yet that in the latter it has ever been considered as a *mere trust* to be exercised by the patron, for the benefit of the church, for the due discharge of the duties of which he alone is to look, which he only can consider *in his life-time*, and upon which his executors or administrators may be absolutely unable to form a judgment? It may appear a futile, and perhaps an unfit argument, but I think it of deep and vital importance to the interests of that church which every good man must love and revere. Suppose a prebendary *died insolvent*, as well as intestate, and that all his next of kin renounced administration, and that his butcher, or baker, or other inferior tradesman, had taken out administration: was this person to present? and yet such a consequence must follow. I have admitted that in the case of *lay* patronage the same consequence would ensue; but I lament it; and am quite sure, that, unless I am compelled by decisive legal authority, I ought not, sitting as a Judge, and regarding the interests of religion, to carry such lamentable consequences one point further; at least, not to introduce them into the church. That the next presentation (in the event that has happened) could not be *assets* (in the common and legal acceptance of that word) is quite clear, and therefore I cannot conceive that it ought to go to the executor or administrator of the deceased prebendary. It may be a chattel; but, in the hands of an ecclesiastic, it is a chattel of mere trust. The total silence of our books during the whole period of our ascertained law of *England*, when the same thing must have existed in fact many hundreds of times, is, as I have heard it said to me, a strong proof that no such idea upon this question was ever entertained until *now*; and I verily believe that no man living in the church of *England*, and interested in such questions, ever before heard of such a claim. The Court has been much pressed, in the course of the argument, by the statute 28 *Hen. 8*, c. 21; but, upon a full consideration of it, I think

that statute has no bearing upon the present question. It appears that, at that time, the heads of the church, following the example of the Pope, who, till the Reformation, had exercised a most tyrannical sway over all churches under his dominion, had been desirous of keeping in their hands the temporalities of the church which belonged to them in their corporate character, whether aggregate or sole, to an unreasonable time, for their private benefit. The statute deprived them of that right, and gave the profits to the incoming possessor from the death of the last incumbent, and to the executors of such successor if he should die before he realized those profits; and therefore, although I was at first taken with that argument, yet, when it comes to be sifted, it does not appear to me to bear upon the point now before us. Bishops' grants, and several entries have been stated, and cases were quoted in reply from *Croke Elizabeth*, upon which I would observe, that, when they were decided, being soon after the time of the reformation, the church had hardly got into a state of rest; and we all know, both from history and law, that, till that time, the scandalous use made by the popish clergy of their revenues, and the rapacious and grasping manner in which they invaded the rights of the church, was matter of universal complaint. Even in this very reign of *Elizabeth*, and at a later period in it, we find the Legislature declaring, that, "Whereas, by the intent of the founders of colleges, churches collegiate, churches cathedral, &c., elections, presentations, nominations, &c. are to be had and made of the fittest and most meet persons, freely, without any reward, gift, or thing given or taken for the same; yet notwithstanding, it is seen and found by experience, that the said presentations, &c., be many times wrought and brought to pass with money, &c., whereby the fittest persons to be elected, wanting money or friends, are seldom or not at all preferred, &c." The Legislature of the country, therefore, has sanctioned me in the reprobation I have used, as to the shameful venality of the churchmen of that day.

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It does not appear from any of the cases in *Croke Elizabeth*, that the bishops took any profits for their grants; if they did, I have no hesitation in saying that it was a most disgraceful abuse of their sacred trust, and I do not believe that such cases would be supported, if brought into discussion at the present day. But there will be no opportunity given for such discussion, for I am quite confident that there is not a bishop of the church of *England* who would not think himself insulted by such a proposition. The Court has been much pressed by the opinions of the archbishops. To which I answer that they also are anomalies in the law. They were originally, as far as we can trace them, an usurpation in favour of the legatine power annexed by the Pope to the archbishopric of *Canterbury*, over those who were appointed bishops under him; and that claim, which, as *Blackstone* says (a), was originally only an encroachment, like most of the others of the Papal see, has been continued to the archbishops in their respective provinces, even after the power of the Pope had ceased in this country. But all these anomalies I desire to use in support of my argument, to shew that the rights of *lay* and *ecclesiastical* persons stand upon a totally different foundation; and that the common law of the country, as attaching upon property of this description in the hands of a *lay* person, does not attach upon a person who merely holds *jure ecclesiæ*. We have been also much pressed with the case of *Repinton v. The Governors of Tamworth School* (b), which has been fully explained by my brother *Burrough*, to whose argument I refer, not wishing to trespass longer than is necessary upon the other business of the Court. The ground of my opinion is, that this, in the case of a *spiritual* patron, is a mere *personal* trust to be exercised by him in his spiritual character, which he cannot, consistently with his high duty, either delegate to another during his life, or leave behind him

(a) Vol. 1, page 381.

(b) 2 Wils. 150.

to be exercised by his heir, executor, or administrator, after his death. He holds it *jure ecclesiæ*, and in that right only. If he have it not in right of his church, he cannot have it all; and, as soon as he dies, all his rights, powers, and privileges, as to the church, absolutely cease, as if he had never existed. This is not a new notion; for Dr. *Burn*, who was a man of very considerable learning, and who may now perhaps be considered as an authority as much as Bishop *Gibson*, shews clearly what was the common understanding of men, and particularly amongst ecclesiastics. Dr. *Burn*, in drawing a distinction between what is to be done with the possessions of a prebendary *after his death*, which he had in common with the rest of the chapter, and what he had in his separate capacity as a sole corporation of himself, says (a): “The issues of those possessions which a prebendary hath in common with *the rest of the chapter*, shall, after his death, be divided amongst the surviving members of the chapter; but the profits of those possessions which he hath in his separate capacity, as a sole corporation of himself, shall be and enure to his successor.” Therefore, if a member of a chapter, as an aggregate corporation, should die after a living had become vacant, it might as well be contended that his executor or administrator might have a voice in the chapter as to how it was to be filled up, as that such executor or administrator might have it to himself exclusively, where a living belonged to him as a *sole* corporator merely; although Dr. *Burn*, as I think more justly, says, in the one case, it would go to the surviving members of the chapter, and in the other, it would be and enure to the successor. When *Gibson* says that advowsons may be granted by deed or will, either for the inheritance, or for the right of one or more turns, or for as many as shall happen within a time limited, he is speaking of lay patronage only, for he says, “This general rule is to be understood with two limitations, *first*, that it extends

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LINCOLN.(a) See 2 Burn's Ec. Law, 7 Ed. 92, tit. *Deans and Chapters*.

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not to ecclesiastical persons of any kind or degree *who are seised of advowsons in right of their churches*, nor to *masters and fellows of colleges*, nor to *guardians of hospitals*, who are seised in right of their houses; all these being restrained, as to bishops by the statute 1 *Elizabeth*, and the rest by 13 *Elizabeth*, from making any grants but of things corporeal, of which a *rent or annual profit may be reserved*, and of that sort, advowsons, and next avoidances, which are incorporeal, and lie in grant, cannot be. And therefore such grants, however confirmed, are void against the successors, and though they have been adjudged to be good against the grantors (the bishops, deans, masters, or guardians) during their own times (alluding, no doubt, to the cases from *Croke Elizabeth*, upon which I have already given my opinion), yet have such *grants been generally disused by bishops*, and *I believe by all other ecclesiastical corporations*, since the following canon of 1571 (a): *Episcopus præbendarum, et beneficiorum suorum, proximas, secundas, aut tertias advocaciones, quas vocant, nulli dabit; sunt enim et a bonis moribus, et a Christianâ charitate, alienæ*; and yet, in the teeth of this very canon, and within a few years after it was made, we find the two grants made in the cases cited from *Croke Elizabeth*. It will have been observed, that, hitherto, I have treated this question on principle only, upon the distinction uniformly observed in the laws and constitution of *England*, between the lay and clerical character. They have (and formerly had much larger) exemptions on the one hand; they have disabilities on the other. This distinction between laymen and the clergy pervades every page of our constitutional history. But I have said that there is no *case in specie* to be found applicable to the present. Those, however, who are at all well versed in the ecclesiastical history of our venerable church, will immediately recognize the justice of those principles which I have been en-

(a) See Gibson, 758.

deavouring to establish. It is well known, that, in the early periods of the church in this country, the *parochia* or parish was the episcopal district, the Bishop and his clergy living together at the cathedral church; and that all the tithes and oblations of the faithful were brought into a common fund for the support of the bishop and his college of presbyters and deacons, for the repair and ornaments of the church, and for other works of piety and charity. While this state of things continued, in the infancy of society, the stated forms of religion were performed only in these single choirs, to which the people of each whole diocese or *parochia* resorted, especially at the more solemn seasons of devotion. But, to supply the inconvenience of distant and difficult access, the bishop was wont to send forth some of his presbyters into the remoter parts, *as a kind of Missionaries*, to be itinerant preachers, and occasional dispensers of the word of God, and the sacraments of the church; and these missionaries returned from their circuits to their home, that is, to the episcopal college, to give the bishop a due account of their labours and success. But, as the wants of society for spiritual instruction increased, and when the members of the episcopal college, or the deans and chapters, found it inconvenient to go forth and perform the duties themselves, certain churches were allotted, some by lay-men, where they had the patronage given them as a compensation for having built and endowed churches (which, as I before mentioned, was the foundation of lay patronage); some by the bishops, to the prebendal body at large; some to one particular member of the body; or the individual member sent out priests to do the duty, paying them certain sums for doing so, and retaining the remainder of the profits to himself, or allowing them to receive the profits, reserving a certain rent to himself; as may be seen by those who will take the trouble to look into old church records: and thus these churches became *prebendal*; and thus the supply of the duty was left to the aggregate corporation, if the perpetual advow-

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son was in the whole community of the dean and chapter, or to that sole corporation, or single canon or prebendary, who was to have his prebend or exhibition from it. In process of time, these representative curates, who were to account for their profits, and only to receive a small pecuniary stipend for their services, were so ill paid, that the bishop obliged the members of his churches who had such advowsons, to retain fit and able *capellans*, *vicars*, or *curates* (for these titles all meant the same office), with a competent salary; and, this plan failing in its effect, the bishop again interfered, and obliged the clergy (that is, the chapter, or the single canon, or prebendary, in whom the perpetual advowson in right of the chapter, or in right of his prebend of which he was seised *jure ecclesiæ*, was vested) to make presentations to perpetual vicars to be endowed and instituted, who should have no other dependence upon the spiritual patron than rectors had upon their lay patrons, with a competent maintenance to be taxed and assigned by the bishop: and this matter became the subject of legislative consideration, by the statute 4 *Hen. 4*, c. 12. In giving this historical detail, I have not thought it necessary to refer to authorities; but what I have said will be found as the early history of our church, in various books well worthy attention; such as, *Spelman, De non temerandis ecclesiis*, who says (a), that “*Proprietaries* of advowsons are still said to be the parsons of their churches, and are as the incumbents thereof, and, by reason of this their incumbency, the churches are full and not void.” So, also, Bishop *Kennett on Impropriations*, and *Burn’s Ecclesiastical Law*, tit. *Appropriation*, may be referred to, on this point. This short history of the church in general I think decidedly proves that what is thus vested in the church for *spiritual* purposes, vests in them as a corporate body, and can never be allowed to fall into the private common stock of the body at large, or of the individual sole spiritual

(a) Page 15.

corporator. What I have said of the church at large, I have no doubt may equally apply to the church of *Salisbury*, and whoever will consult the history of the foundation of that church, in *Dugdale's Monasticon Anglicanum*, as quoted by my brother *Burrough*, by *Osmond*, Bishop of *Salisbury*, Earl of *Dorset*, and nephew of *William* the Conqueror, will probably find that this history of the foundation of these prebendal presentations in the church at large, which I have been giving, is no other than the history of the church of *Salisbury* also. I am afraid I have fatigued the Court, but, as we are not unanimous in opinion, I thought it necessary, in a case of such research and novelty, to shew that I acted upon a deep conviction that I had formed a right conclusion. The sum and substance of my opinion then is this—whenever a person has any thing attached to a spiritual office only, it sinks with the death or resignation of the party who possesses that right. Thus, then, an ecclesiastical person is, during his incumbency, entitled to all the profits which may fall of a chattel nature, but, when a living, to which an ecclesiastical person has *in right of his church* a right to present, falls vacant, he can derive no profit from it, but merely presents *quasi incumbens*. The living in the present case may, as I have shewn, be assumed to have been endowed out of the prebend, or the advowson of it to have been given or attached to the prebend. In either case the *prebendary for the time being* has the right of presentation, and when the avoidance happens he may present, but he presents in right and *only in right* of his church; he presents as a *trustee*; the trust is personal; it is a trust only, and without profit, and consequently cannot be transmitted. How, then, can the executor or administrator of a deceased ecclesiastic, who dies after avoidance, but before presentation, claim the right of presentation? Is it that he may make it a *chose in action*, to pay the debts of the testator or intestate? That cannot be, for

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it is not *assets*. Does he claim to present because this trust had devolved upon, or, as it were, become vested in, the testator? The trust had indeed devolved upon the testator or intestate, not however in his own right, but, as the declaration states, *in right of his prebend*; and, the moment he ceased to be prebendary, the trust was no longer in him, nor in his representatives, for it was a *bare naked personal trust* in him, and the presentation is only in him whilst he is prebendary, not for his own use or benefit, but *for the use and benefit of the church*. It is a trust *confided to him* for the dignity and ornament of the church, that he may appoint a proper incumbent upon his own *personal responsibility* to have the cure of souls, and for the advancement of the interests of religion; a duty which his executors or administrators cannot in law be deemed fit or qualified to discharge. For these reasons, I think the defendants are entitled to judgment.

Lord Chief Justice BEST.—It appears from the pleadings in this case, that the prebendary of *Grantham* is patron of the rectory of *Welby*, and that the incumbent of that rectory died in the life-time of the late prebendary, who died without having presented any clerk to the vacant rectory. The plaintiff is the administratrix of the late prebendary, and the question for our decision is, whether, under these circumstances, the plaintiff is entitled to present for this turn to the rectory of *Welby*. I confess that my mind has fluctuated exceedingly, but I am at length satisfied that the law gives the patronage in this case to the person who, according to sound policy, ought to have it. Great industry has been bestowed on the subject, both by the Bench and the Bar, but neither the judgment of any Court, nor the opinion of any writer, has been found, to guide us in our decision. I have also inquired whether any instances of presentation made under circumstances similar to the present are to be found in the registers of the bishop, but without success. As neither

the records of *Westminster Hall*, nor those of the church, furnish any rule or practice to assist me in coming to a decision, I endeavoured to find other cases from which I could safely reason by analogy to that now to be decided; but have failed in so doing. In all sciences, analogical reasoning must be pursued with great caution. Minute differences in the circumstances of two cases will prevent any argument from being deduced from the one to support the other. I was at first struck with the appearances of similarity between the patronage of tenants for life, and of husbands in right of their wives, and that of dignitaries of the church in right of their churches. I am, after the most attentive consideration of these cases, now convinced that the resemblance between the last and the two first fails in the very circumstance which, in my judgment, decides to whom the presentation belongs in this case. I shall, presently, particularly advert to this circumstance. I would, however, first observe, that, in the absence of authority, the only course that can lead us to a just and legal conclusion, is, to consider the origin of church patronage, and the intent of its founders. If the intent of the founders can be ascertained, it must, if not opposed to some rule of law, or to the undoubted policy of the law, govern us in deciding this case. If he who creates a right has directed by whom and how it shall be enjoyed, those who are to decide any question on that right must consider how he has disposed of it, and follow that disposition. This is evidently consistent with reason and justice, and is sanctioned by legal authority. In disputes between members of corporations, the Courts of law decide according to the will of the founder, as expressed in the instrument of incorporation, or ascertained by usage. This principle is distinctly stated by Lord *Kenyon*, in *The King v. Bellringer* (a), and by Mr. Justice *Buller*, in *Blankley v. Winstan-*

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(a) 4 Term Rep. 822.

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ley (a). In *Gape v. Handley* (b), this principle is applied by Lord *Mansfield*, and the Court of *King's Bench*, to determine whether the right of presentation to a living was in all the members of a corporation, or in the mayor and aldermen only. So, where two claim under the same grant, the Court which has to decide on their claims must be governed in its decision by the intent of the grantor, and by that only. In this case, the administratrix of the last prebendary, and the successor, must both found their claims on the grant of the donor of the property out of which the prebend was founded, and on the act of appropriation by which it was founded. From these are derived all the rights and privileges that belong to the prebend. To these we must look, to see in what course of succession that prebend is to go; what fruits of it are ripe, and to be enjoyed by the person in possession, and those who represent him; and what are reserved for the successor. Unfortunately, historians have been too much occupied in exhibiting the human character, as it has displayed itself in the wars and intrigues that have engaged the attention of mankind, to bestow much of their time in giving any account of civil or ecclesiastical institutions. Whoever wants information as to the establishment of these institutions must submit to the labour of collecting it himself from the records of the public offices. We have ourselves done so in this case, and I think that by connecting some unpublished documents with what is to be found in our law books, we ascertain that the more pious founders of churches, who not only divided portions of their lands, and the tithes of what they retained for their own use, for the maintenance of the ministers of the gospel, but also gave the advowsons of the churches they founded to the church, intended that such advowsons should be pure ecclesiastical trusts, which, after the dedication of them at the altar, were never to be dis-

(a) 3 Term Rep. 288.

(b) 3 Term Rep. 288, n.

posed of by any layman. The church would have considered it sacrilege in a layman to presume under any pretence to touch this sacred property. The Roman Catholic Church, from which ours is derived, did not regard the personal representatives of its members. The policy of that church was, to separate churchmen from their families, to prevent their acknowledging any connection but with the church. In the infancy of that church, and before those laws were made by which the separation of priests from the world was completely effected, we find *Clement* declaring in one of his constitutions (a), that “*omnium rerum ecclesiasticarum episcopus curam gerito, et eas dispensato quasi instante Deo; non licitum ei esto quippiam ex iis sibi tanquam proprium assumere aut cognatis suis elargire quæ Deo dedicata sunt.*” Here, the law for preserving the property of the church, and preventing it from passing into the families of its members, was first declared. The principle laid down in that constitution has never been departed from, but has been repeatedly confirmed. Several of the documents which we have obtained relate to the prebend of *South Grantham*. As these documents are not set out on this record, I shall not use them as evidence of any facts peculiar to this case, but merely as historical proof of the origin and nature of church patronage in general, and of the manner in which churches became possessed of their patronage, and how it has been dealt with. This patronage was first given to the whole body of the clergy of a diocese. The general body afterwards appropriated part of what they had in common to the exclusive use of the bishops; other part to the deans and chapters; and with other part prebends were founded by the bishops, with the assent of the deans and chapters. This is stated by Doctor *Burn*, in his *Ecclesiastical Law*, title *Appropriation*; and he is confirmed, as to the first grant being to the body of the clergy of each diocese, by a grant which we found

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in the chapter-house of *Salisbury*, and which is also printed in *Dugdale's Monasticon Anglicanum* (a), by which *Osmund*, Bishop of *Salisbury*, Earl of *Dorset*, and nephew of *William* the Conqueror, and the founder of the church of *Old Sarum*, for the sake of his soul, and the souls of his ancestors, granted as follows:—" *In nomine sanctæ et individue Trinitatis, ego, Osmundus, Seriberiensis Ecclesiæ Episcopus, omnibus Christi fidelibus, tam posteris notifico quam præsentibus, ad honorem Domini nostri Jesu Christi, sanctissimæque Mariæ Virginis, et pro salute animarum Will. Regis, et uxoris suæ Reginæ Matildis, atque filii sui Will. Regis Anglorum, Regni successoris; pro salute etiam animæ meæ, Ecclesiam Seriberiensem me construxisse, et in eâ canonicos constituisse; atque illi viventibus canonicè bona Ecclesiæ ita sicut ipse obtinueram libere, et ut exigit regularis censura canonicè imperpetuum concessisse, has scilicet villas præter militum terras, Elemininister, Cernenenister, Begmenister, &c., et Ecclesias de Grantham, cum decimis ceterisque ibidem adjacentibus.—Scripta est autem hæc carta, et confirmata, anno incarnationis Domini, MXCI., inductionis XIV., Willielmo Rege Monarchiam totius Angliæ strenuè gubernante, anno quarto regni ejus, apud Hastings. His subscriptis testibus de illâ medietate oblationis principalis altaris quam retinet Episcopus, in manu suâ dabuntur, uni canonicorum per annum, quatuor libræ, quousque præbenda sua perficiatur. Quisquis vero hæc pervertere voluerit, perpetuo anathemate &c.*" Lord Coke is mistaken when he says (b), that "at first, all the possessions were to the bishop." These possessions belonged to the whole body, and the whole body only could dispose of them; and accordingly we find that these possessions, amongst which will be observed the *Ecclesias de Grantham, cum decimis ceterisque ibidem adjacentibus*, were afterwards appropriated by the church to different members. This is proved by the evidence-book in the same chapter-

(a) Vol. 3, p. 375.

(b) 3 Rep. 75 b.

house, which states that a general chapter of the members of the church was holden (at what date is not known, but it was previous to the removal of the church from *Old Sarum* to *Salisbury*, which took place in 1220), at which time the churches, with the tithes and other rights belonging to the body, were appropriated, some to the bishops, some to the deans, and some to the canons or prebendaries to whom the cure of the different churches was assigned. Doctor *Burn*, in the chapter to which I have already referred, tells us that the prebendaries, who, by means of such appropriations, became possessed of what were called prebendal livings, at first appointed curates to the duties of those churches; but that they were afterwards required to make a better and more permanent provision for the officiating ministers. He also gives us the form of the constitution of a vicarage which he found in the church of *Carlisle*. This form of Doctor *Burn* is like one which we have obtained from the church of *Lincoln*, viz. the constitution of a vicarage in one of the parishes belonging to the prebend of *Grantham*. By these ordinations of vicarages, as they are called, either portions of the tithes, or an annual rent, and the advowsons of the vicarages, are reserved to the prebendary, and the residue is given to the vicars on the condition of their performing the duties of the churches. One of the ordinations now remaining in the registry of the Bishop of *Lincoln*, in the time of Bishop *Wills*, who began to preside over the diocese in 1209, is in these words:—

“ *Riç de Newere capellanus p̃sent p̃ Galfrið de Boc-
lond Canonic p̃bende aust̃lis de Grāham ad p̃petuam ejus-
dē p̃bende vicariam consensu dñi Sar̃ et capituli sui Sar̃
ad id accedent̃ ad eandē admissus est et in ea vicarius
p̃ptuus institut̃. Consistit antid̃ca vicaria in medietate
al̃vgii tam de Grāham q̃m de Gunwardeby et in omnibus
p̃ventibus altariā de Morton et de Bresceby et solvet vica-
rius d̃co G. et successoribus suis ejusdē p̃bende canonicis*

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*centū solid annuos nōic pensionis et in officio sacerdotali
 psonaliū ibidī minist^rbit sustinendo omīa onīa poehialia
 dcam p^bbendam contingencia Et mand^t est dco Archid^t ut,
 &c."*

There are also in the church of *Salisbury* several grants of churches to the bishop. According to these grants, he and his successors are to take and dispose of these churches as he does of his other churches or prebends. All these grants are in this form. As the churches were given to the whole body of the clergy of the diocese, the donors must have intended that they should be disposed of only by the members of that body. The donors could not know that these churches would ever be appropriated to particular members of the body, and could not therefore intend that the lay representatives of any of the members should ever have the disposition of them. For, if they had still remained in the aggregate corporation of the clergy of the diocese, personal representatives never could have any right. They might have thought that the property given by them was for ever vested in the church, and that it could not, under any circumstances, ever be touched by lay hands. When the churches afterwards appropriated portions of this property to different members, the only thing intended, was, to give the exclusive possession of the portions assigned to those members, to hold, in right of the church, by those *members and their successors*. The prebendaries thus constituted were made corporations sole subordinate to the church, so that they and their successors were from time to time to represent the church, and to enjoy the rights which were derived from the church, in return for the duties which they were to perform. Neither the donors nor the appropriators could intend that the personal representatives of deceased prebendaries should ever interfere with any thing that belonged to the church. The intent of both donors and appropriators is opposed to the plaintiff's claim; and their intent must give the rule

for our judgment. The ecclesiastical law, in a case like the present, follows what I trust I have shewn must have been the intent of the donors of property to the church; and where the ecclesiastical law does not contravene the law of *England*, it is adopted into that law, and is to be followed by the temporal courts in the decision of such cases as are within its influence. Lord *Coke* says (a), the ecclesiastical law is to prevail where it is not against the common law or any custom. *Lyndwood*, in his treatise, *Provinciale (seu Constitutiones Angliæ), Liber Primus, De Consuetudine*, has this passage (b):—*Quid si rector vel hujusmodi beneficiatus decedat intestatus, et non disponat de fructibus de jure communi Ecclesia in eis succedat. De consuetudine tamen posset esse, quod per Episcopum vel alium ad quem pertinerent bona testatorum tueri, deberent distribui ad decedentis debita solvenda.* The ecclesiastical law, or common law of *Christendom*, is here meant by *jure communi*. By the words “*De consuetudine*,” the custom of particular kingdoms is intended; for this writer, in the same page, says, “*Quia est consuetudo per Angliam quodammodo generalis.*” According to the general law, the church succeeds to fruits not disposed of by an incumbent previously to his death; and *Lyndwood* explains what he means by the church succeeding to fruits, by saying, “*pertinent ad successorem* (c).” I admit that the custom of *England* will prevent the operation of the ecclesiastical law in all cases embraced by such custom. That custom, however, does not apply to the presentations to benefices, but only to such things as can be sold for the payment of the debts of the deceased. These are the very words of *Lyndwood*, “No profit can be made of a presentation to a vacant benefice, it can therefore be in no way used for the payment of debts.” It was decided in *Hobart* (d), that a right of presentation was not conveyed by the

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(a) 1 Inst. 344 a.

(b) Fol. 26.

(c) Fol. 25.

(d) 304.

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words, "*commodities, emoluments, profits, and advantages* of a prebend;" and that these words included only such commodities, profits, and advantages, as became due to the incumbent, and which he, having earned, had a right to apply to his own use. To such as these the custom applies, and not to trusts. Upon the same principle that a guardian in socage cannot take a presentation, *vis.* because he can make no profit of it (*a*), the personal representative of a deceased incumbent cannot take it under this custom. If a right of presentation is not within the custom, then it is governed by the general law; and that general law, as I have proved by the writings of a canonist of the highest authority, who is often quoted with approbation by Bishop *Gibson* and Doctor *Burn*, gives it to the successor. If it be asked, what have the Judges of the common law, when giving judgment in an action of *Quare Impedit*, to do with the canon law, I answer, that, where the right of presentation is derived from the church, it can only be decided by the canon law. Lay advowsons were attached to manors, and the right of presentation to these could only be decided by the common law, as they follow the rights of the manors to which they were annexed, and which manors were the creatures of the common law. But ecclesiastical presentations, having no connection with lay property, but existing only as rights of the church, are governed only by the laws of the church. The ecclesiastical law is, for the decision of such questions, the law of *England*, and must be taken notice of by the Judges of the Courts of common law in deciding them (*b*). Tithes are a spiritual right, and as such they were originally recoverable only in the ecclesiastical Courts. Actions may now be brought in the Courts of common law for subtraction of tithes; and tithes may be recovered in a Court of equity: but these

(*a*) 1 Inst. 89 a.

(*b*) See the case of *Edes v. The Bishop of Oxford*, Vaughan, 21.

Courts in deciding what tithes are due, and how they ought to be set out, consult the ecclesiastical law. There are now indeed so many decisions of the Courts of *Westminster* upon the subject of tithes, that it is seldom necessary to have recourse to the canonists; but, if cases occur for the decision of which our reports contain no precedents, the common law or equity Judges must look at the canons and customs of the church, and must be governed by them in the decision of such cases. If tithe cases are within the legal operation of the canon law, the present question must be so likewise; for I have shewn that the original grant to the church was a grant of tithes, and that the patronage of livings belonging to the church was derived from grants of tithes, by the appropriations that were made of them.

I hope I have shewn that the donors of churches and tithes to the clergy of dioceses, and the appropriators of such churches, intended that they should be for ever vested in the church, devoted to sacred uses, and disposed of only by sacred hands; that the ecclesiastical law, in deciding between the last incumbent and the successor, proceeds according to the intent of the donors and appropriators; and that the custom of *England*, spoken of by *Lyndwood*, does not apply to a right of presentation to a vacant living; and, further, that the ecclesiastical law must determine to whom such presentation belongs. This intent of the donors prevents any analogy between ecclesiastical and lay patronage. The former is inseparably attached to the church, and to be disposed of only by churchmen. The latter is attached to the temporal estates of the founders of churches, and to be disposed of by those who happen to be the owners of the estates. Lay patronage being, from the conditions which its founders made, annexed to temporal estates, must sometimes pass, with the estates to which it is annexed, to infants and others incapable of exercising the right of presentation. This condition has occasioned a great defect in the law relative to this

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species of patronage ; but, as it must be disposed of by some one connected with the estate, it does not concern the public whether it belongs in such a case as the present to the heir or to the executor of the person last seised of the advowson. One of them is as likely to present a proper clerk as the other. Ecclesiastical patronage is subject to no such condition. The founders of ecclesiastical patronage looked to the advancement of religion. The founders of lay patronage to the maintenance of the influence of their families. Courts of Justice should not, unless compelled by some clear rule of law, take church patronage from the churchmen, whose situation and character are securities for the due exercise of it. By assigning it to the personal representatives of deceased patrons, they subject it to what it is from its original constitution exempt, *viz.* the chance of falling into the hands of incapable persons, such as infants and creditors. I have said that I think the difference between the object of the founders of ecclesiastical and lay patronage renders it impossible to reason analogically from the former to the latter. If there be any analogy between them, it raises an inference unfavourable to the plaintiff. The successor of a corporation stands in the same relation to his predecessor, that the heir to an estate does to his ancestor. Now, it was determined by the Court of *Common Pleas*, after two arguments, in the case of *Repington v. The Governors of Tamworth School* (a), that, where a donative became vacant in the lifetime of the owner of the advowson, who died before it was filled up, the donative belonged to his heir, and not to his executor. This decision was pronounced on a motion in arrest of judgment. If the executor, when the judgment was arrested, had thought proper, that judgment might have been examined in a Court of error ; but it was never disputed. *Selden*, in his *History of Tithes* (b), tells us, that, until the time of King *John*, there was no institution ; all

(a) 2 Wils. 150.

(b) Vol. 3, chap. 12, fol. 380, p. 88.

livings were donatives. The Judges in the case above stated confirm the account of this learned writer. The heir must have had the donation in every such case as the present; and, if the heir would have had it in lay patronage, if analogy is to be referred to, the successor must have it in ecclesiastical patronage. If a person, in right of his estate, or any public functionary, has the appointment to any office that becomes vacant, and which is not filled up during the life of the patron, the person who succeeds to the office or estate to which the patronage is annexed has the right of appointment; and if we established a difference between the patronage of the church, and other patronage, we should create an anomaly in the law highly injurious to the interests of the church. This is strictly analogous to the present case. The office of *Exigenter* became vacant during the life of *Brooke*, Chief Justice of the *Common Pleas*; Queen *Mary*, during the vacancy of the office of Chief Justice, appointed *Colsehill exigenter*: *Brown* was afterwards appointed Chief Justice, who removed *Colsehill* from his office, and admitted *Skrogges*, his nephew. The Judges of the *King's Bench*, the Chief Baron, the Attorney-General, and the Attorney of the Duchy, held that this office was only at the disposal of the Chief Justice for the time being, as an inseparable incident belonging to the person of the Chief Justice—*Skrogges v. Colsehill* (a).

I will now shortly consider the arguments urged in favour of the plaintiff. It has been contended that the right of presentation to a vacant living is by the vacancy severed from the advowson to which it belonged, and becomes a chattel, and that a chattel cannot pass to the successor of a corporation sole, except under the statute of *Henry* the 8th, which conveyed only such fruits as fell during the vacancy. Our law would be most absurd, if

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the determination of rights depended on names only. Either the right of presentation to a vacant benefice is not severed from the advowson until such right has been fully exercised, and is not a chattel; or its being classed among chattels does not prevent it from passing to the successors. If this be not so, the donative in the case in *Wilson* could not have belonged to the heir; for the right of donation was as completely severed from the advowson in that case as the right of presentation in this. The reference to the statute of *Henry 8* is unfavourable to the plaintiff's argument, for *Gibson* says, it was only an affirmance of the common law, by which the fruits enumerated in it belonged to the successors, and the object of it was to put an end to the usurpations of the bishops, who, in defiance of the common law, took fruits from those who succeeded to benefices. Fallen fruits, or chattels severed from the living, did therefore pass to the successor by the common law. It has been also insisted, that, if the rights to such presentations were perpetually annexed to the church, and could in no case be exercised by laymen, the King could not take them as parts of the temporalities of bishops, abbots, and priors. The King takes these by his prerogative. His rights, although determined by law, are often different from those of a subject under similar circumstances. Bishoprics, abbays, and priories, were founded by the Crown. The King is "*persona sacra*," he is supreme ordinary (*a*), and was, by the statutes of the 16 *Richard 2*, c. 5, and 26 *Hen. 8*, c. 1, declared to have always been justly and rightly supreme head of the church. It cannot, therefore, be considered that the objection to a layman's interference with church patronage applies to the King. I would here observe, that, in the different abridgments of the law, it is said, that, in these cases, the right of presentation belongs to the King, *and not to the bishop's*

(a) Comyns's Digest, tit. *Ecclesiastical persons* A.

executors. It might have been inferred from the words, "*and not to the bishop's executors,*" that, but for the intervention of the prerogative, the presentation would have belonged to the bishop's executors. I have looked into the *Year Books*, and can find in the case referred to nothing said about executors, nor was an executor a party in the cause. There is therefore no authority for the introduction of the words, "*and not to the bishop's executors.*" It has been said, that, as the estate which an ecclesiastic has in his church is of the same quality as that which a lay tenant for life has, the right of the personal representative of the former to present to a church must be the same as that of the personal representative of the latter. These estates are only alike in this, *viz.* that each must determine with the life of its holder. The estate of the ecclesiastic may indeed determine before, by resignation, deprivation, or the acceptance of another benefice. But the estate of the tenant for life is held by him in his *own right*, solely for his own benefit. The estate of the ecclesiastic is held in right of the church, and for the service of the church. On the death of a tenant for life, there is some person in existence who represents the estate; but, on the death of a beneficed clergyman, his estate in the benefice is in abeyance until the appointment of a successor (a). The moment that successor is appointed, his estate relates back to the death of his predecessor, so that there is no time for the right of a personal representative of the latter to intervene. The law with respect to the exercise of the right of presentation is different in the case of an ecclesiastical estate from what it is in the case of a lay estate. An ecclesiastical patron can only present one clerk, and, if that clerk be rejected for insufficiency, the patron is not entitled to notice of his clerk's being rejected. All ecclesiastical presentations state that the person present-

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(a) Co. Lit. 342 b.

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ing is either bishop or prebendary, or other person having church patronage, and that he collates or presents in right of his bishopric or prebend, or other dignity. That is apparent from the following forms:—

Presentation of the Rev. William Dodwell.

“ To the Right Reverend Father in God, *John*, by
 “ divine permission, Lord Bishop of *Lincoln*, to his vicar
 “ general in spirituals, or to any other person or persons
 “ having or to have sufficient authority in this behalf,
 “ *William Dodwell*, Doctor in Divinity, Prebendary of
 “ the prebend of *South Grantham*, anciently founded in
 “ the cathedral church of *Sarum*, and, *in right of that pre-*
 “ *bend*, the true and undoubted patron of the rectory of
 “ *Welby*, in the county of *Lincoln*, and your Lordship's
 “ diocese of *Lincoln*, Greeting:—

“ I PRESENT to your Lordship, and to the rectory and
 “ parish church of *Welby* aforesaid, now void by the re-
 “ signation of *Basil Cave*, clerk, the last incumbent there,
 “ and to my presentation in full right belonging, my be-
 “ loved in Christ, *William Dodwell*, clerk, Master of Arts,
 “ humbly praying that your Lordship would be graciously
 “ pleased to admit and canonically to institute him, the
 “ said *William Dodwell*, to the rectory and parish church
 “ of *Welby* aforesaid, to invest him with all and singular
 “ the rights, members, and appurtenances thereunto be-
 “ longing, to cause him to be inducted into the real, ac-
 “ tual, and corporal possession thereof, and to do all other
 “ things which to your pastoral office may in this case
 “ appertain or belong. In witness whereof, I have here-
 “ unto set my hand and seal, this twenty-seventh day of
 “ *October*, in the year of our Lord one thousand seven
 “ hundred and seventy-five.

In the presence of

Thos. M. Morton,
R. Dodwell.

} *William Dodwell*, (L. s.)

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“ JOHN, by Divine permission, Bishop of *Salisbury*,
 “ to our well beloved in Christ, *Thomas Rennell*, clerk,
 “ B. D., health, grace, and benediction. We do hereby,
 “ freely, and out of mere good will, give and confer upon
 “ you the prebend or canonry of *South Grantham*, found-
 “ ed in our cathedral church of *Salisbury*, vacant by the
 “ death of *Robert Price*, clerk, L. L. D., the last prebend-
 “ ary thereof, and belonging in full right to our donation
 “ or collation by virtue of our bishopric. And we do
 “ duly and canonically institute you in and to the said
 “ prebend or canonry, and invest you with all and singu-
 “ lar the rights, members, privileges, and appurtenances
 “ thereunto belonging (you having first, before us, made
 “ such subscriptions, and taken such oaths, as are in this
 “ case by law required to be subscribed and taken).
 “ And we do, by these presents, assign and appoint unto
 “ you the stall in the choir of our said cathedral church
 “ belonging to the said prebend or canonry, and to the
 “ same hitherto usually assigned. Saving always to our-
 “ selves our episcopal rights, and the dignity and honour
 “ of our cathedral church of *Salisbury*. In testimony
 “ whereof, we have caused our episcopal seal to be here-
 “ unto affixed. Dated this 17th day of *April*, in the year
 “ of our Lord, 1823, and of our translation the sixteenth.

*J. (L. s.) Sarum.”**Collation of the Rev. T. H. Mirehouse.*

“ JOHN, by Divine permission, Bishop of *Salisbury*,
 “ to our well beloved in Christ, *Thomas Henry Mire-*
 “ *house*, clerk, M. A., health, grace, and benediction.
 “ We do hereby, freely, and out of mere good will, give
 “ and confer upon you the prebend or canonry of *South*
 “ *Grantham*, founded in our cathedral church of *Salis-*
 “ *bury*, vacant by the death of *Thomas Rennell*, clerk,
 “ B. D. the last prebendary thereof, and belonging to our

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“ donation or collation *in full right by virtue of our bish-*
 “ *opric.* And we do duly and canonically institute you
 “ in and to the said prebend or canonry, and invest you
 “ with all and singular the rights, members, privileges,
 “ and appurtenances thereunto belonging (you having
 “ first, before us, made such subscriptions, and taken
 “ such oaths, as are in this case by law required to be
 “ subscribed and taken). And we do, by these presents,
 “ assign and appoint unto you the stall in the choir, and
 “ place and voice in the chapter, of our said cathedral
 “ church, belonging to the said prebend or canonry, and
 “ to the same hitherto usually assigned. Saving always
 “ to ourselves and our successors, bishops of *Salisbury*,
 “ our episcopal rights, and the dignity and honour of our
 “ said cathedral church of *Salisbury*. In testimony where-
 “ of, we have caused our episcopal seal to be hereunto an-
 “ nexed. Dated this sixteenth day of *July*, in the year
 “ of our Lord, one thousand eight hundred and twenty-
 “ four, and of our translation the eighteenth.”

J. (L. s.) *Sarum.*”

These forms of presentations shew the connection of the party presenting with the church. An administratrix could not use such words in her presentation. It behoves those who support her claim to shew some law that would authorize a bishop to institute on a presentation that did not contain them. A lay patron may present two persons, and allow the bishop to take one of them. He may revoke his presentation, and present another clerk; he is entitled to have notice of the rejection of his clerk for incompetency; and he does not name in his presentation the estate in right of which he presents. If these patrons are subject to different laws whilst living, why must their patronage be subject to the same laws when they are dead? In *Rolle's Abridgment* (a), there is this passage: “ *Si le parson doit presenter al' vicarage, uncore si le vicarage devigne void*

(a) Tit. *Presentment al' Eglise* (F), Vol. 2, 346.

durant le vacancy del' parsonage, le patron del' parsonage presentera." Lord Rolle refers to 19 Edw. 2, *Quare Impedit*, 178. It may be said, if the successor is the representative of the Church, he should have presented. In this case, it does not appear that there was any successor at the time of the presentation. Formerly, patrons kept churches vacant for many years, and, in the mean time, took the fruits. It does not appear whether the patron was a layman or an ecclesiastic. But I have looked through the 19th Edw. 2d, and found only two cases of *quare impedit*. In the first, the plaintiff claimed to present as the heir of the person last seised of the advowson; and the question was, whether she was the heir or not; and it is material to observe that no point was made in favour of an executor: the second, which I think is the case alluded to by Lord Rolle, was a case in which the King claimed to present to a living in the patronage of a prior, during the vacancy of the priory. The case of a prior is like that of a bishop; and the King's claim was founded on his prerogative, by which he is entitled to the patronage of vacant bishoprics, abbeys, and priories. Lord Rolle has, therefore, no authority for saying that any other patron except the King, in these particular cases, would have had the right of presenting to a vicarage becoming vacant during the vacancy of the rectory. It has also been urged, on the part of the plaintiff, that, as an ecclesiastical patron may grant a right of presentation to a layman, by deed, he may give a presentation that becomes vacant in his life-time, by his will, or that it will belong to his administrator, if he make no will. I am not prepared to admit, on the authority of the two cases cited (and I can find no other), that an ecclesiastical patron can grant the next presentation to any living in his patronage. The case in *Hobart* does not decide the point. The judgment there was that the words of the grant were insufficient to convey the right of presentation. The case in *Croke Elizabeth* cannot be law

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The grant was of an archdeaconry, a judicial office, without reference to the statute of *Edw. 6th*, which passed before the deed was executed. I think we should now scarcely endure to hear it argued, that one who had the appointment to a judicial office might assign that appointment. If he could grant it in his life-time, that very case is an authority that such a grant will not bind his successor, for the report states that such an assignment would be within the restraining statute of the 1st of *Elizabeth*. But, although an ecclesiastical patron might grant the right of presentation when the church is full, does it follow that he could grant it when the church is void, and when his grant is not to take effect until after his death, and must bind his successor? Such a grant would be against the letter of the restraining statute; and the passing of such patronage by will or letters of administration, which cannot take effect until after the death of the testator or intestate, is against the spirit of that statute. The options assigned to archbishops by bishops, on their consecration, have been mentioned. I do not pretend to decide on the validity of these grants, or on the rights of archbishops to bequeath by their wills the patronage conveyed to them. It is true, that the trusts of such wills have been recognised in the Court of *Chancery*; but, in the cases in which they came before that Court, all the parties were interested in considering them legal, and no objection to their legality was made. I have heard it said that this right of archbishops is derived from the Pope. *Lyndwood* says the Pope has "*Potestas supra Jura*." If, in the exercise of this, which *Ballarmino* calls his *extraordinary authority*, he could give this right to the archbishops, such a right must be an anomaly in the law. But I think the papal power, both *ordinary and extraordinary*, had been overthrown in this country before these grants were first made. *Gibson* says that the old practice was for the archbishops to require bishops, on their consecration, to

provide for some particular clergyman, leaving the provision to be made, and the time of making it, entirely to the bishop; and that the first instance of an assignment of any particular benefice to the archbishop, is to be found in the writings of Archbishop *Cranmer*. If there are no such assignments of an earlier date, it would be difficult to support them without the aid of an act of Parliament. If, after all the labour that has been bestowed in investigating this case, there still remains a doubt how it should be decided, we are, I think, then permitted to consider the decision that will most advance the cause of the established religion; and we should lay down such a rule as is most likely to secure the presentation of the fittest persons to fill churches that are left vacant at the death of ecclesiastical patrons. My regard for the family of the excellent person whose death has given rise to this question, is too well known for it to be supposed that the observations I am about to make can be applied to them. But, generally speaking, I think it cannot be doubted that the successor is more likely to make a judicious and disinterested choice than the personal representative of the late prebendary. A presentation in the hands of an administratrix, is, like lay patronage, liable to fall into the hands of a person who is unfit for the exercise of such a trust—a woman, an infant, an ignorant person, or a disappointed creditor. The successor must be a clergyman, a dignitary of the church, a person whose education and habits qualify him to appoint, and whose situation and character are the best security for his making a proper appointment. If we wanted an instance to prove how well and how disinterestedly ecclesiastical patronage is bestowed, I might mention that of the late lamented prebendary of *Grantham*. I believe he was selected for the situations which he held, by the University of *Cambridge*, and by two distinguished prelates, only because he was known to be a person the best qualified to discharge the various and important duties of those situations. The

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clergy know that the filling the churches with learned and pious clerks is the most effectual human means of *lengthening the cords and strengthening the stakes of their tent*. Such dignitaries of the church as hold ecclesiastical patronage, will, I hope, bestow it on such worthy clerks as are most able and desirous of promoting piety and morality. In this hope, I will never consent to withdraw it from the church, by whom the original donors intended it should be administered, or to permit any layman, under any pretence, to interfere with the disposition of it. For these reasons, I think our judgment should be for the defendants.

Judgment for the defendants.

Monday,
Nov. 28th.

A'COURT v. CROSS.

In *assumpsit* for money lent, the defendant pleaded *actio non accrevit infra sex annos*, and, on his being arrested, he said to the sheriff's officer, "I know I owe the money, but the bill I gave is on a three-penny receipt stamp, and now I am arrested I will never pay." Held, that this was not such an acknowledgment of the debt as would take the case out of the statute of limitations.

THIS was an action of *assumpsit*, brought to recover the sum of 30*l.* lent and advanced by the plaintiff to the defendant in the year 1817. The declaration contained the common money counts. The defendant pleaded, *first*, the general issue; and *secondly*, *actio non accrevit infra sex annos*, on which issue was joined.

At the trial, before Mr. Justice Gaselee, at the last assizes for the county of *Somerset*, the only question was as to the sufficiency of an acknowledgment made by the defendant, to take the case out of the statute of limitations. For the plaintiff, a sheriff's officer was called, who stated that the defendant, on being arrested, a few days before the last *Hilary* Term, said to him, the officer, "I know I owe the money, but the bill I gave is on a three-penny receipt stamp, and now I am arrested I will never pay." The learned Judge, being of opinion that this was not a sufficient acknowledgment, from which to infer a promise to pay the debt, so as to take the case out of the statute, nonsuited the plaintiff,

reserving to him leave to move that the nonsuit might be set aside, and a verdict entered for him, in case the Court should be of opinion, that, from the above acknowledgment, a promise by the defendant might be inferred, so as to revive the original debt.

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Mr. Serjeant *Wilde*, on the first day of this Term, accordingly obtained a rule *nisi*, and submitted, that the admission made by the defendant, that he owed the plaintiff the sum for which he was arrested, was sufficient to take the case out of the operation of the statute, although accompanied by a refusal to pay. The learned Serjeant referred to the cases of *Swan v. Sowell* (a), *Mountstephen v. Brooke* (b), *Coltman v. Marsh* (c), *Ward v. Hunter* (d), *Leaper v. Tatton* (e), *Rowcroft v. Lomas* (f), and *Bryan v. Horseman* (g), as being the most recent decisions bearing on the question, and on the latter of which he principally relied.

Mr. Serjeant *Spankie* now shewed cause.—The decisions on the construction of the 3rd section of the statute of limitations, as far as regards this point, have fluctuated for more than a century, and particularly within the last twenty-five years; and indeed the more recent cases have almost the effect of throwing the statute into desuetude. The first innovation was, that, if a defendant would take advantage of the statute, it was necessary for him to plead it, although the cause of action appeared, on the face of the declaration, to have accrued more than six years before; and that he could not give it in evidence under the general issue: and the reason assigned in *Stile v. Finch* (h), was, because the plaintiff might be within the exceptions in the statute. The same point was afterwards adjudged

(a) 2 Barn. & Ald. 759.

(b) 3 Barn. & Ald. 141.

(c) 3 Taunt. 380.

(d) 6 Taunt. 210.

(e) 16 East, 420.

(f) 4 Mau. & Selw. 457.

(g) 4 East, 599.

(h) Cro. Car. 381.

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in *Hawkins v. Billhead* (a), with this additional reason, that a *latitat* might have been sued out within time; and continued down to the writ with which the defendant was served; and in *Dean v. Crane* (b) it was decided, that, if a defendant plead the statute, and the plaintiff take issue upon it, evidence of a promise by the defendant, within six years before the commencement of the action, to pay the debt, is sufficient to take the case out of the statute. In *Heylin v. Hastings* (c), it was held, that, although a promise was conditional, it was sufficient if the plaintiff performed the condition; but all that the Court there decided, as far as regards the present question, was, that the bare acknowledgment of a debt within six years would not amount to a new promise, but was only *evidence* of a promise, and did not, therefore, of itself, take a case out of the statute. But even this distinction seems to have been since disregarded; for, in *Trueman v. Fenton*, Lord Mansfield, as to the reviving a promise at law, so as to take it out of the statute of limitations, said (d), "The slightest acknowledgment has been held sufficient; as saying, 'prove your debt and I will pay you.'—'I am ready to account, but *nothing is due to you*;' and much slighter acknowledgments than these will take a debt out of the statute." That *dictum*, which may be considered as extrajudicial, has been since too much attended to. The rule was better expounded in the earlier authorities, which came nearer to the true and reasonable exposition of the statute. In *Lacon v. Briggs*, Lord Hardwicke said (e): "There must be a direct admission of a debt to take it out of the statute; though there have been several cases at law, where this has not been held sufficient, unless it is likewise attended with an express promise to pay; but that may

(a) Cro. Car. 404.

389, 421; Com. Rep. 54.

(b) 6 Mod. 309.

(d) Cowp. 548.

(c) Carth. 470; S. C. 1 Ld. Raym.

(e) 3 Atk. 107.

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be rather too hard." In *Bass v. Smith* (a), where the defendant pleaded *non assumpsit infra sex annos*, and the plaintiff proved an acknowledgment of the debt within six years, Lord *Hale* held that the acknowledgment of the debt was no more than was done by the plea; but that there must be a new promise of the debt within six years to make the action hold. In *Sparling v. Smith* (b), where, after six years, the defendant offered to pay if the plaintiff would come to account, Lord Chief Justice *Holt* ruled that it did not revive the promise, because it was not an *actual promise*.—These earlier authorities are decisive to shew that a mere *acknowledgment* is not sufficient to take a case out of the statute, unless it be connected with a *promise to pay*; and even if such acknowledgment might, in law, be considered equivalent to a promise, such reasoning could not apply here, for the defendant expressly refused to pay. It might be now advisable to adhere strictly to the letter of the statute, which is a highly beneficial law, and ought to be favoured; as the security of all persons depends upon it; for, the permitting parol proof of vague admissions or acknowledgments within six years to be received, to bring a case within the meaning of the statute, tends to open a wide door to fraud and perjury, and to prevent that tranquillity which it was the express object of the Legislature to afford.

Mr. Serjeant *Wilde*, in support of his rule.—The object of the statute being, to protect men against the revival of dormant claims, and the avoidance of suits, has always received a liberal construction; and, although it is to be lamented that there have been conflicting decisions upon it, still they must be considered as well with reference to the different periods at which they were pronounced, as to the change of times and circumstances since the statute was passed. In *Bryan v. Horseman*, where most of the

(a) 12 Vin. Abr. 229, tit. *Evidence*, (T. b. 63), pl. 4.

(b) 1 Ld. Raym. 741.

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previous authorities were considered, it was held, that an acknowledgment of a debt, although accompanied with a declaration by the defendant, that he did not consider himself as owing the plaintiff a farthing, it being more than six years since he contracted, was sufficient to take the case out of the statute. There, as here, the defendant made the acknowledgment to the sheriff's officer on being arrested; and Lord *Ellenborough* said, that, whatever the opinion of the Court might have been had the question been new, yet, after the long train of decisions upon the subject, it was necessary to abide by the construction which had been put upon it. In *Swan v. Sowell*, the plaintiff brought an action against the defendant as maker of a promissory note over-due more than six years, and he pleaded the statute of limitations, and it was proved, that, on the plaintiff's shewing the defendant the note within six years, he said: "you owe me a great deal more money, and I have a set-off against it." Mr. Justice *Bayley* and Mr. Justice *Holroyd* thought that this was not a sufficient acknowledgment within six years to take the case out of the statute; but Mr. Justice *Best* said, "that he was of opinion, on the authority of the cases of *Lloyd v. Maund* (a), and *Rucker v. Hannay* (b), that there was sufficient evidence to be left to the Jury to consider whether it amounted to an acknowledgment of the debt." So, here, it should have been left to the Jury to say whether the acknowledgment by the defendant that he owed the money, did not amount to an admission of the debt, or raise an inference of a promise to pay; particularly as the current of authorities shews that even an acknowledgment which repels the presumption of a promise of payment, is in legal effect tantamount to a promise to pay. Although such an acknowledgment be accompanied with a refusal, yet the condition or refusal is void in point of law, and the admission of the debt be-

(a) 2 Term Rep. 760.

(b) 4 East, 604, n.

ing due, is, of itself, sufficient to revive it, so as to bring the case within the meaning of the statute.

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Lord Chief Justice BEST.—I fully agree with my brother *Wilde*, that it is much to be lamented that there have been so many vacillating decisions upon this point. When any branch of the law is brought into a state of doubt by too nice refinement, if the question arise on a statute, the evil is only to be remedied by going back to the statute itself as framed by the Legislature, without even noticing the earliest decision on its construction; in order that we may find a correct principle on which to act in future. The third section of the statute directs that all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, trover, and replevin, all actions of account, and upon the case, and all actions of debt grounded upon any lending or contract without specialty, shall be commenced and sued within six years next after the cause of such actions or suit, and not after. All these different species of actions are put upon one and the same footing. It has been frequently said, that this is a statute of peace. The object of the Legislature in passing it, was, to protect persons against dormant or by-gone claims; for the title of the act is, “An act for limitation of actions, and for avoiding of suits in law,” and the words at the commencement are exceedingly strong, *viz.* “for the quieting of men’s estates.” A man six years ago might, if called on, have been enabled to pay all his debts; but, if one or more of his creditors choose to sleep so long, and afterwards demand payment, when his debtor might, in the interim, have been oppressed by adverse circumstances, it would be an act of cruelty and oppression. The very object of the statute was to prevent such stale demands. It also limits the period within which writs of formedon are to be sued out, *viz.* within *twenty* years; and it directs, that no persons, after the passing of the act, shall make any entry into lands, but within *twenty* years next after their right or title accu-

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ed. In such a case, a party must shew that he has a clear and unqualified right of possession, and no acknowledgment or admission by the adverse party will affect that branch of the statute. So, an admission or acknowledgment cannot apply to the several causes of action specified in the third section, *viz.* trespass, debt, detinue, replevin, &c., in all of which, with the exception of the action of *assumpsit*, the six years commence from the time the cause of action arises, and not after. But, in *assumpsit*, it has been held, that, although six years have elapsed since the debt was contracted or the demand arose, if the debtor promise to pay it at any time within six years, he cannot avail himself of the statute; because, the promise, being founded on a moral consideration, gives a new cause of action, so as to revive the original debt. But the Courts have gone still further, and have held that a bare *acknowledgment* of a debt within six years is sufficient to take a case out of the statute, although unaccompanied by any *promise to pay*. That appears to me to be against the spirit and letter of the act. If, however, a particular construction has been put on a statute, which has been followed by a long and uniform series of decisions, it ought not to be departed from. But, where there are conflicting authorities, or where the principles on which those authorities are founded appear doubtful, we ought to go back to the fountain-head, and take the statute itself for our guide. If I were now sitting in a Court of error, I think I should say that any acknowledgment of a debt, although made in distinct and unqualified terms, would not deprive the party making it of the protection of the statute. But, in this case, it is unnecessary to consider that point, nor need we encroach upon any decision, with the exception of *Bryan v. Horseman*, the authority of which has been much doubted in several subsequent cases. There, the acknowledgment of the existence of the debt was deemed sufficient to take the case out of the statute, although Lord *Ellenborough* considered at the trial, that, if the matter had

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been *res integra*, the point might have admitted of doubt. There, too, the defendant did not refuse to pay the plaintiff's demand, which he expressly did in this case; but merely said, "that he did not consider himself as owing the plaintiff a farthing, assigning as a reason, that it was more than six years since he contracted." In *Swan v. Sowell* the defendant did not deny the debt, but told the plaintiff that he owed him, the defendant, a great deal more money, and that he had a set-off against the note shewn him by the plaintiff: Mr. Justice *Bayley* and Mr. Justice *Holroyd* were of opinion, that that was not a sufficient acknowledgment to take the case out of the statute. In *Knott v. Farren* (a), on the plaintiff's demanding payment of two promissory notes over-due ten years, the defendant said, "I cannot afford to pay my new debts much less my old ones;" and it was held that the Jury were warranted in negating this as an acknowledgment or evidence of a subsisting debt to take the case out of the statute. Although there may be cases where a mere acknowledgment has been deemed sufficient to amount to evidence on which a Court may presume a promise to pay; yet, if any thing be said at the time to repel the inference of a promise—as where a man acknowledges a debt, but, at the same time, actually refuses to pay, and assigns a reason for so doing—it is too much to say that it will revive the debt, so as to bring the case within the operation of the statute. Here, then, there was no ground to infer a promise to pay; but, on the contrary, the defendant expressly said, that he never would pay, because he had been arrested, and that the bill he gave was on a wrong stamp, thereby negating the plaintiff's right to recover. I am, therefore, of opinion that this rule must be discharged.

Mr. Justice PARK.—I lament that the sum for which the defendant has been arrested is so small that it

(a) 4 Dowl. & Ryl. 179.

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is not advisable to direct any further proceedings, as I much wish to have the opportunity of hearing the decision of a Court of error on this subject, it being impossible to reconcile the various decisions upon it. A positive refusal to pay, of course, negatives the presumption of a promise. In *Bryan v. Horseman*, the defendant acknowledged that part of the plaintiff's demand remained due, but said that he did not consider himself as owing the plaintiff any thing, it being more than six years since he contracted. Here, however, the defendant said, "now I am arrested, I will never pay;" and yet it has been said that this, coupled with an acknowledgment of the debt being due, was sufficient evidence of a *promise to pay*, so as to take the case out of the statute. I own I think the inference of such a promise is repelled. In *Rowcroft v. Lomas*, the plaintiff produced a receipt, by which the latter acknowledged to have received of the former £4., which he was to account for on demand; and, on the defendant's being shewn the document, he said he knew all about it; and, on being asked for its amount, he answered that it was not worth a penny, and that he should never pay it, although he admitted the signature to be his: and the Court held it to be insufficient to charge the defendant, as it did not amount to an acknowledgment. There, *Bryan v. Horseman* was relied on, but the Court distinguished it from the case then before them, on the ground that, in the latter, the defendant, although he relied on the statute, acknowledged at the same time that a certain sum remained due to the plaintiff.

Mr. Justice GASELEE (a).—The numerous conflicting decisions on this branch of the statute, as well as the perplexing authorities as to the construction of the statute of frauds, shew the great danger of Courts of law leaning too much in favour of equitable principles. We ought not

(a) Mr. Justice Burrough was at Chambers.

to give a statute such a construction as the Legislature could not have anticipated. I must confess I have always been dissatisfied with the decision in *Bryan v. Horseman*. It, in fact, amounts to an absolute repeal of the statute. I admit that there may be cases where a party ought not to avail himself of the statute; and that, whether or not a party has used terms amounting to an acknowledgment of the original debt or demand, is a question for the consideration of the Jury. But, in this case, I think the plaintiff should have declared specially, as the defendant could not have been aware that he intended to avail himself of the subsequent acknowledgment. I own I am somewhat surprised at what fell from Mr. Justice *Bayley*, in the late case of *Clark v. Hougham*, where that learned Judge is reported to have said (a), “Wherever it appears by the acknowledgment of the party that a debt is not paid, that takes the case out of the statute, *Leaper v. Tatton* (b), *Dowthwaite v. Tibbut* (c); and, according to these cases, it makes no difference, whether the acknowledgment be accompanied by a promise or *refusal to pay*.” But, in *Rowcroft v. Lomas*, where the defendant admitted the demand, on being shewn the receipt, but said that it was not worth a penny, that it was out of date, and that he would never pay it—it was held that the demand was not revived by such an admission, as there was no evidence of an acknowledgment. So, here, the defendant said that the bill he gave was on a wrong stamp, and that he would never pay. In *Snook v. Mears* (d), it was proved, that the defendant, after having denied the existence of a debt demanded of him, replied, to an assertion by the plaintiff that he had documents in his possession which would prove it,—“It is of no use for me to look at them, for I have no money to pay it now”—the Court of *Exchequer* held that a nonsuit directed by Mr. Justice *Abbott* was right: and Mr. Baron

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(a) 2 Barn. & Cress. 149.

(b) 16 East, 420.

(c) 5 Mau. & Selw. 75.

(d) 5 Price, 636.

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Graham and Mr. Baron *Garrow* said, that the legal effect of such a conversation as had been proved to have been had between the parties, had been already decided on in the case of *Rowcroft v. Lomas*; and that the authority of the case of *Bryan v. Horseman* had been shaken. The case of *Coltman v. Marsh* is in direct contradiction to *Rowcroft v. Lomas*, as far as it relates to the denial of the debt. There, the plaintiff was nonsuited; and the Court afterwards decided that there was nothing to be left to a Jury. These later cases appear to me to establish the true principle. If the defendant had merely said, "I know I owe the money," I should, had I tried the cause, have left it to the Jury to say whether it amounted to an acknowledgment of the debt from which a promise to pay might be inferred; but, as he added, that, as he had been arrested, he would never pay, and that the bill he gave was on a receipt stamp, I think, taking the whole of the sentence together, it cannot by any ingenuity be construed into an acknowledgment, so as to revive the original demand, or be taken to amount to a promise to pay.

Rule discharged.

END OF MICHAELMAS TERM.

CASES
ARGUED AND DETERMINED
IN THE
Courts of Common Pleas
AND
Exchequer Chamber,

IN HILARY TERM,

IN THE SIXTH AND SEVENTH YEARS OF THE REIGN OF GEO. IV.

ARNOTT v. REDFERN and Another.

THIS was an action of *assumpsit* upon a judgment obtained by the plaintiff against the defendants in the High Court of Admiralty in *Scotland*, on the 26th *February*, 1818. The judgment found, that, "by accounts made up by the plaintiff, there was due to him a balance amounting to 236*l.* 6*s.* sterling," and decerned and ordained the defendants "to make payment to the plaintiff of the said sum of 236*l.* 6*s.* sterling, accordingly, *with interest thereon from the 16th March*, 1811, *till paid*; together with the sum of 30*l.* 14*s.* 2*d.* sterling, being the modified expenses of process found due; and also 1*l.* 10*s.* 1*d.* sterling, being the fees of extracting the decree, and the stamp thereon."

The declaration consisted of a special count on the judgment, counts for work and labour, the money counts, a count for interest, and an account stated.

The defendants pleaded the general issue.

At the trial, before Lord Chief Justice *Best*, at the

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A foreign judgment is *prima facie* evidence of a debt, and that every thing was done in the Court in which it was obtained, that was necessary to support it.

In whatever form a debt accrues, whether on a contract bearing interest, or otherwise, if it has been wrongfully withheld from the plaintiff, he using means to obtain it, the Jury may give interest upon it, in the shape of damages for the unjust detention.

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Sittings at *Guildhall* after last *Trinity* Term, the judgment of the *Scotch* High Court of Admiralty was produced, and the following facts proved.

The plaintiff resided at *Leith*, in *Scotland*. The defendants were wholesale grocers in *London*, and had employed the plaintiff as their agent for the sale of goods in *Scotland*, on commission. The terms of the contract between the parties were contained in the following letter, addressed by the plaintiff, whilst in *London*, to the defendants:—

“ *London*, 17th *September*, 1808.

“ Gentlemen,—I have no objections to conduct your concerns in *Scotland*, should you approve thereof by a few lines confirming the terms below stated, *vis.*—I shall make a point of going my journies regularly at the routes left with you, to sell and collect, and remit regularly all monies received, upon receiving such; and also will guarantee one fourth part of such sales, and allow my whole commission to stand over for the purpose of making up any deficiency, if any, so far as the said fourth part of the real loss. This I do upon your paying me *one per cent.* upon the amount of the whole sales made in *Scotland* of goods sent thereto by your house; and *one half per cent.* more upon said gross amount, as a compensation for said one fourth guarantee: that is, *one and a half per cent.* upon the whole amount, for commission and for guarantee. All postages, and carriage of parcels, &c., to be paid by you.”

On the 20th *September*, the defendants wrote to the plaintiff, assenting to the terms proposed by him; and he was accordingly employed by them as their agent until 1811, when they relinquished their *Scotch* connection. The plaintiff's accounts were not finally arranged till 1815, and he obtained judgment on them in the High Court of Admiralty in *Scotland*, in 1818. In 1819, he commenced the present action upon the judgment so pronounced; but, the defendants having obtained a rule requiring the plain-

tiff to give security for costs, on the ground of his being resident without the jurisdiction of this Court, the proceedings therein were stayed. In 1825, the plaintiff came to reside in *London*, and the suit was prosecuted.

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On the part of the defendants, it was contended, that, as the contract which was the foundation of the judgment pronounced by the High Court of Admiralty in *Scotland*, was made in *England*, and was a contract upon which by our law no interest could have been allowed, the Court was not bound by that part of the *Scotch* judgment which awarded interest to the plaintiff.

The Lord Chief Justice observed, that all contracts must be enforced according to the law of that country in which they are made, or in which they are to be performed; and expressed himself of opinion, that, as the contract in question was made in *England*, and the defendants' performance of their part of it, *viz.* payment of the plaintiff's commission, was also confined to this country, the contract could not legally be enforced in *Scotland* for that which would not have been recoverable here.

Under his Lordship's direction, therefore, the Jury returned a verdict for the plaintiff for the amount of the debt, excluding interest; leave being reserved to the plaintiff to move the Court, that the damages might be increased by the amount of the interest, should the Court be of opinion that he could claim it.

Mr. Serjeant *Taddy*, accordingly, in *Michaelmas* Term last, obtained a rule *nisi*.

Mr. Serjeant *Vaughan*, in the course of the same Term, shewed cause.—The contract on which the *Scotch* judgment was founded, was entirely made in this country; all the parties were in *London*, where the defendants resided and carried on their trade: the laws of this country, therefore, must regulate and control the transaction. In *Robin-*

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son v. Bland, Lord Mansfield said, that (a), "in every disposition or contract, where the subject-matter relates locally to *England*, the law of *England* must govern, and must have been intended to govern." If the action had originally been brought here, no interest could have been allowed (b). In *Atkinson v. Lord Braybrooke* (c), it was held, that interest is not recoverable in an action on a foreign judgment; and in the case of *Hunter v. Bowes* (d), where, in *assumpsit* on a foreign judgment, the defendant suffered judgment by default, and the Jury, on the execution of the writ of inquiry, gave interest, this Court, on motion, reduced the verdict. The High Court of Admiralty in *Scotland* exceeded its jurisdiction, when it awarded interest upon an *English* contract, on which interest could not have been recovered in an *English* Court of Justice. That the judgment of that Court is not conclusive, is evident from the language used by Lord Chief Justice *Eyre*, in giving judgment in the case of *Phillips v. Hunter* (in error). His Lordship there said (e): "It is in one way only that the sentence or judgment of the Court of a foreign state is examinable in our Courts, and that is, where the party

(a) 2 Burr. 1077.

(b) In *Trelawney v. Thomas* (1 H. Blac. 303), it was held, that, in *assumpsit* for *work and labour* and *money paid*, the Jury might in their verdict calculate interest on the *money* advanced, but not on the damages for the *work and labour*; and in *Walker v. Constable* (1 Bos. & Pul. 306), that, in an action for money had and received, the plaintiff could recover only the net sum received, without interest. See also *Tappenden v. Randall*, 2 Bos. & Pul. 467, and *Gordon v. Swan*, 12 East, 419. But see the case of *Milsom v. Hayward* (9 Price, 134), where it was held, that, although a Jury, on the exe-

cution of a writ of inquiry, cannot give interest in an action for *work and labour*; yet, that, where they have deducted, on the whole amount of the plaintiff's demand, *ten per cent.*, in conformity with an agreement between the parties that such deduction should be made for ready money, the Jury might re-allow the plaintiff a proportionate part of that deduction on the balance found to be due to him, which had remained for a considerable time unpaid. See also *Nichol v. Thompson*, 1 Campb. 52, n.

(c) 4 Campb. 380.

(d) 1 Mau. & Selw. 173, n.

(e) 2 H. Blac. 410.

who claims the benefit of it applies to our Courts to enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it, not as obligatory to the extent to which it would be obligatory, perhaps, in the country in which it was pronounced; nor as obligatory to the extent to which, by our law, sentences and judgments are obligatory; not as *conclusive*, but as matter *in pais*, as a consideration *prima facie* sufficient to raise a promise: we examine it as we do all other considerations of promises; and, for that purpose, we receive evidence of what the law of the foreign state is, *and whether the judgment is warranted by that law.*" On these authorities, therefore, it is evident that the contract in the present case, having been made in *England*, is to be regulated by the law of this country; and that the *Scotch* judgment is not *per se* conclusive in our Courts, but only subject to a certain modification.

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Mr. Serjeant *Taddy*, in support of his rule.—The judgment pronounced in this matter by the High Court of Admiralty in *Scotland*, like all other foreign judgments, is conclusive, and must be enforced by the Courts here, unless it be shewn to have been unduly or irregularly obtained. The plaintiff, therefore, is clearly entitled to the interest which the *Scotch* Court has decreed to be paid to him. Besides, under the circumstances of this case, even in our Courts, a Jury would be well warranted in awarding to the plaintiff interest upon his debt, in the shape of damages for the unjust detention of it (*a*). Where part of

(*a*) In *Slack v. Lowell* (3 Taunt. 157), the plaintiff declared in the common form, for *goods sold and delivered*, and, the Jury having given interest on the price, from the stipulated day of payment, the Court refused to reduce the ver-

dict by the amount of the interest, saying, that, the merits being with the verdict, they would not alter it; and recognizing the case of *Mountford v. Willes* (2 Bos. & Pul. 337), where Lord *Mansfield* said (3 Taunt. 160) it was decid-

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a transaction arising out of a contract entered into in this country, is carried on in a foreign country, by the laws of which interest is allowed upon a debt arising out of such a contract, our law will also allow that interest which would have been recoverable in the foreign Courts. Thus, in the case of *Auriol v. Thomas* (a), it was held that the indorsee of a dishonoured foreign bill, protested for non-payment in *India*, was entitled to charge the indorser with interest, exchange, and other expenses, together exceeding five *per cent.*, provided such charges were usual and reasonable, and not made a colour for usury: and in *Harvey v. Archbold* (b), where the defendants, merchants at *Gibraltar*, received consignments of goods from the plaintiffs in *London*, and, on the delivery of the bills of lading and invoices to their agents in *London*, advanced, through them, to the defendants two-thirds of the invoice price, by bills at *ninety days*, charging interest, at the rate of 6*l. per cent.* (the usual rate of interest at *Gibraltar*), from the date of the bills—it was held that this was not a loan of money in *England*, and therefore not usurious. Interest at the rate allowed in *India* may be recovered here on a bond given in that country. So, mortgages of *West Indian* property executed in this country, bear interest at the rate payable in the *West Indies*. As, therefore, in this case, the whole of the contract to be performed by the plaintiff, *vis.* the selling the goods and remitting the proceeds to the defendants, was to be performed in *Scotland*, his claim for commission, arising out of the contract, was a debt accruing to him in *Scotland*, and consequently within the jurisdiction and under the control of the *Scotch* Courts; and, the Court of Admiralty there having

ed, that, if the Jury took upon themselves to give interest by way of damages, the Court would not on that account set aside the ver-

dict. And see *Marshall v. Poole*, 13 East, 98.

(a) 2 Term Rep. 52.

(b) 3 Barn. & Cress. 626.

power to award interest according to the laws of that country, the judgment of that Court must be enforced to its fullest extent here.

Cur. adv. vult.

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Lord Chief Justice BAST, now delivered the judgment of the Court.

This was an action of *assumpsit*, on a judgment obtained by the plaintiff against the defendants, in the High Court of Admiralty in *Scotland*, which Court, it seems, has jurisdiction over contracts and debts payable on demand. The contract on which the judgment in this case was obtained was an agreement between the plaintiff and the defendants, that the former should sell goods for the latter in *Scotland*, receiving, by way of compensation, a commission of *one per cent.* on the gross amount of sales, and *one half per cent.* for guaranteeing *one fourth* of the amount of sales effected by him.

It was assumed, in the argument, that the Courts of Justice in this country could not have allowed interest to be given in such a case as this. Assuming that proposition to be maintainable, we found ourselves embarrassed by two questions of international law, of considerable difficulty and importance—of difficulty, because of rare occurrence—of importance, because depending on the rules by which justice is to be administered to the subjects of foreign states.

For these reasons, we delayed giving judgment until now, in order that we might avail ourselves of the leisure afforded us by the vacation, to give the subject that attentive consideration which its importance seemed to call for.

We now think that we ought not to have taken it for granted, that, if this cause had in the first instance been tried in *Westminster Hall*, instead of in the Court of Admiralty in *Scotland*, the plaintiff could not have recovered

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interest; and, therefore, that it is quite unnecessary for us now to consider whether the case should have been decided according to the law of *Scotland*, or that of this country; or whether or not the judgment pronounced in the Court there be conclusive, or impeachable here. It was decided by the House of Lords, the highest tribunal of the country, in the case of *Sinclair v. Fraser* (a), that a foreign judgment is *prima facie* evidence of a debt, although it is competent to the defendant to impeach the justice of it, or to shew that it has been irregularly or unduly obtained; and that decision is perfectly consonant with the principles of natural justice. To whatever country a debtor may fly, justice requires that the law of that country should, provided he be of ability, compel him to pay his debts. It is often impracticable, in a foreign state, to prove debts by the testimony of witnesses. The only mode by which they can be established, is, by the judgments of the Courts of the countries in which the parties and their respective witnesses resided at the time of contracting such debts. The only objection that has been made to this judgment is, that it gives the plaintiff *interest* upon a debt due to him for *work and labour*, which in our Courts would not bear interest. But, if under any circumstances a Jury in this country would have been authorized to give interest for such a debt as this, in the shape of damages for the detention of it, the objection is disposed of. We have looked into the proceedings with a view to ascertain whether the circumstances of this case were such that a Jury here might have been warranted in giving damages for interest; and we take the rule to be, that, if interest could be given in any such case, we may presume, in the absence of evidence to repel such a presumption, that the plaintiff was entitled to it from the day on which the High Court of Admiralty has decreed it. If, then, interest is to be given according to our own law, it may be calculated up

(a) Howell's State Trials, Vol. 20, p. 469; S. C. 1 Doug. 5, n. 1.

to the time when the payment of the principal may be enforced under the judgment. We cannot, therefore, object to the terms of the *Scotch* decree, by which it is ordered, that interest be paid up to the time when the principal debt shall be discharged. The original action was brought to recover a certain stipulated compensation for the labour of selling goods for the defendants, and for guaranteeing, to a certain extent, the solvency of the purchasers. The plaintiff had no opportunity of paying himself out of the money he received on account of the defendants, he having agreed to remit to them the whole amount of what he received, leaving his commission in their hands as a security for his paying, to the extent of his guarantie, such sums as might become due to them for goods not paid for by the purchasers. It is true that such a contract does not import that *interest* should be paid for any money that should become due under it. By our law, interest forms no part of the original debt; it is created only by the express terms of a contract, by an engagement implied from the nature of the security, or by the usage of the trade to which such contract relates. This is a wise rule. It prevents acts of kindness from being converted into mercenary bargains, and makes it the interest of tradesmen to press their customers for payment of their debts; thereby in a great measure preventing the extension of credit, which frequently proves ruinous on both sides. Had it appeared from the evidence that the plaintiff in this case had taken no steps to recover his debt, interest could not have been allowed on it in this country; and, in that case, it might have been a question whether we could have enforced a judgment of a foreign jurisdiction, which gave interest in a case where it would not have been allowed by our law (a). In the case of *Lee v.*

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(a) See *Carpenter v. Thornton* was filed in the Court of *Chancery* (3 Barn. & Ald. 52), where a bill for the specific performance of

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Munn (a), this Court decided that an auctioneer who had held a deposit in his hands for four years, was not liable to pay interest on it, the party who made the deposit having made no demand for its re-payment (b). But, in this case we have no right to conclude that the plaintiff quietly permitted the debt due to him from the defendants to remain in their hands. There are, it is true, cases where, when nothing is proved to have been done, it is presumed that nothing has been done; but here, in the language of the House of Lords, in *Sinclair v. Fraser*, the judgment is *prima facie* evidence that every thing was done that was necessary to support it. In whatever shape a debt is contracted, if it has been wrongfully withheld from the plaintiff, he using means to obtain it, the Jury may give interest upon it, in the shape of damages for the unjust detention. In *Eddowes v. Hopkins* (c), Lord Mansfield held, that, in cases of long delay, under vexatious and oppressive circumstances, Juries may, in their discretion, allow interest. In the case of *Craven v. Tickell*, the Lord Chancellor said (d): "From conversations I have had with the Judges, interest is given, either by the contract or in damages, upon every debt detained." From this it appears that the principle on which interest is given in our Courts of law is twofold—*first*, where it is the intent of the parties that interest should be paid, and this intent is to be collected from the nature of the contract—*secondly*, where the debt

an agreement for the purchase of an estate; the decree was for payment of *interest* on the purchase money, and costs; and it was held that no action at law was maintainable to recover such interest and costs.

(a) 1 B. Moore, 481; S. C. 8 Taunt. 45.

(b) But, in an action against the vendors, to recover back a de-

posit made by a purchaser at an auction, on their failing to make a good title, it was held that the purchaser might have, by way of special damage, interest on the sum deposited, from the time the purchase should have been completed. *Farquhar v. Farley*, 1 B. Moore, 322.

(c) 1 Doug. 376.

(d) 1 Ves. 63.

has been wrongfully detained by the debtor: in the latter case, the law allows damages to be given as an equivalent for interest, on account of the creditor's having been for a time deprived of his debt, through the misconduct of his debtor. So, in actions on judgments, on the ground of an improper detention of the debt, Juries may give interest; and in such cases it is wholly immaterial whether the original debt bore interest or not (a). In *Blackmore v. Fleming* (b), Mr. Justice *Lawrence* said, that, if the plaintiff would not consent to a reference to the Master, to ascertain the amount of interest to be allowed by way of damages, after judgment by default, in an action of debt on

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(a) Where interest is given upon the affirmance of a judgment in error, the debt must appear on the record to be one which carries interest (*Doran v. O'Reilly*, 3 Price, 250); it is not allowed upon the affirmance of a judgment merely for money lent (*Gwyn v. Godby*, 4 Taunt. 346), unless it be distinctly proved, or admitted, that the writ of error was brought for delay (*Saxelby v. Moor*, 3 Taunt. 51), or except where the judgment was for goods sold and delivered, which were to have been paid for by a bill, the bill not having been given (*Middleton v. Gill*, 4 Taunt. 298), or where the plaintiffs, as bankers, had been in the habit of charging interest (*Gwyn v. Godby*, 4 Taunt. 346), or where the judgment is for a balance due from a banker, the bank being in the habit of allowing interest (*Ikin v. Bradley*, 8 Taunt. 250; S. C. 2 B. Moore, 206; 5 Price, 536). So, if judgment be entered generally

upon a declaration in *assumpsit*, some of the counts of which are for unliquidated damages, no interest can be allowed on affirmance of the judgment in error (*Powell v. Saunders*, 5 Taunt. 28).

But, when the judgment is affirmed, it then becomes the debt of the bail; and, if an action be brought against them on that judgment, the Jury may give interest, as damages for the detention of the debt (*Frith v. Leroux*, 2 Term Rep. 59); and, if an action of debt be brought against the party himself, on a judgment which has been affirmed in error, the Jury, by way of damages, may give interest upon the sum recovered by the judgment, from the time of signing it, where, by the practice of the Court in which error is brought, such interest is not allowed upon the affirmance. *Entwistle v. Shepherd*, 2 Term Rep. 78.

(b) 7 Term Rep. 446.

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bond, the Court would order a writ of inquiry. There, as the Court were afterwards informed, in *Hilhouse v. Davis* (a), the original cause of action was a tailor's bill; and on the execution of the writ of inquiry, which was afterwards awarded; the Jury gave interest by way of damages. In *Hilhouse v. Davis*, where the defendant had wrongfully withheld the payment of a sum awarded to be paid by him to the plaintiffs, for damages for an injury that they had sustained in the making of the *Bristol Docks*, the Jury gave the plaintiff interest for the detention of the sum so awarded; and Mr. Justice *Le Blanc* said: "The Jury having given interest, we cannot set their verdict aside, without being satisfied that they have done what they were not warranted to do by law. But there is no positive rule of law against their giving interest on a sum ascertained." That decision was subsequent to *Calton v. Bragg* (b), but it does not touch the principle there laid down, neither will our decision in this instance; for, in *Calton v. Bragg*, it was merely held that interest is not due on money lent generally, without a contract either expressed, or to be implied from the usage of trade, or from special circumstances, or from written securities for the payment of the principal money at a given time. Although, in this case, interest might not have been due *ex contractu*, still the party might be liable to pay interest, in the shape of damages, for the unreasonable delay in the payment of the principal due under the contract. We must presume every thing in favour of this judgment; and we say, in the words of Mr. Justice *Le Blanc*, that we cannot set it aside, without being satisfied that the *Scotch* Court has done what it was not by law warranted in doing. We are, therefore, of opinion, that, as there is no ground for impeaching its justice, this judgment ought to be carried into effect.

(a) 1 Mau & Selw. 173.

(b) 15 East, 223.

The rule, therefore, for increasing the damages by the amount of the interest, must be made—

Absolute (a).

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(a) In the case of *Douglas v. Forrest*, (1 Moore & Payne, 663; S. C. 4 Bing. 686), which was an action of *assumpsit*, on two decrees pronounced by the Court of Session, in Scotland, against the defendant's testator, a native of Scotland (but then residing in India), for a debt contracted in Scotland, ordaining the payment of the debt and costs, and legal interest thereon until payment; the case in the text was cited in the argument as an authority proving that interest may be recovered on a Scotch judgment; and that, unless the contrary be shewn, the Courts in this country will presume that the decision of the Court in Scotland was consonant with the justice of the case. To this it was answered, that, although a judgment of a foreign Court may be the foundation of an *assumpsit* here, on the ground that the law will imply a promise by the debtor to pay the debt adjudged to be due to his

creditor; still, that such judgment is only *prima facie* evidence of a debt, and that it is competent to a party sued thereon to shew that it has been irregularly or unduly obtained. The Court, in giving judgment, admitted, that, if the decrees were repugnant to the principles of universal justice, the Courts here ought not to give effect to them; but said, that, in that case, the law of Scotland had only enforced the performance of a moral obligation, by making the debtor pay what he admitted to be due, with interest during the time he had deprived his creditors of their just debts. The plaintiffs had judgment for the debt and costs of the Scotch suits, together with interest thereon, according to the terms of the decrees, computed from the days of citation in those suits respectively, to the day of signing final judgment in the suit here.

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Tuesday,
Jan. 24th.

The plaintiff took possession of premises under an agreement for a lease to be granted to him for a term of *ten* years, at a yearly rent, payable half-yearly. No lease was executed, nor was the *quantum* of rent to be paid ascertained; but the plaintiff occupied under the agreement for *three* years, paying rent for *two*:—*Held*, that this created a tenancy from year to year, and entitled the landlord to distrain for the arrears due, at the rate previously paid.

KNIGHT v. BENNETT.

THIS was an action of replevin. There were several avowries—the first was for two years' rent in arrear from the plaintiff, under a demise, at the yearly rent of 188*l.*, payable half-yearly, at *Michaelmas* and *Lady-Day*, due on the 25th *March*, 1824. The other avowries were for the same rent, stating it to be payable yearly.

To the first avowry, the plaintiff pleaded—*non tenet*, and *riens en arriere*; to the others—*riens en arriere* only; and paid into Court rent to *Michaelmas*, 1823.

The cause was tried before Mr. Baron *Graham*, at the last *Summer Assizes* for *Sussex*. The plaintiff, it appeared, had agreed with the defendant to take a lease of an estate called *Hanbrook* farm, for the term of *ten* years from *Michaelmas*, 1820, at a rent not then agreed upon, but which, when the amount was fixed, was to be paid half-yearly, at *Michaelmas* and *Lady-Day*. The plaintiff entered into possession in *April*, 1821, under this agreement for the proposed lease. The lease was never prepared; but the plaintiff continued to occupy the premises, paid rent, at the rate mentioned in the avowries, up to *Michaelmas*, 1822, and had, in *April*, 1824, promised to pay the rent due at the preceding *Lady-Day*.

For the plaintiff, it was contended, that there was no evidence to support the demise alleged in the avowry (a), the tenancy not being under a present actual demise, but only under an agreement for a future demise; and that, as there was no express reservation of rent, the defendant was not entitled to distrain.

The learned Judge was of opinion that the plaintiff's entering into possession of the premises under the agree-

(a) The argument was confined to the *first* avowry.

ment created a tenancy at will; and that the subsequent payment of rent, and acknowledgment of rent being in arrear, constituted him tenant from year to year, and entitled the landlord to distrain.

The Jury accordingly returned a verdict for the defendant, for 94*l.*; with leave for the plaintiff to move to set it aside, and enter a verdict for him, if the Court should think that the Jury had been misdirected.

Mr. Serjeant *Wilde*, in the last Term, obtained a rule calling on the defendant to shew cause why this verdict should not be set aside, and a verdict entered for the plaintiff, or a new trial had. He submitted that the learned Judge had misdirected the Jury, and that there was no evidence from which a tenancy from year to year might be inferred, nor any payment of rent proved to have been made under the demise stated in the avowry. The learned Serjeant cited the case of *Hammerton v. Stead* (a), where, a tenant from year to year having, during a current year, entered into an agreement for a lease to be granted to him and *A. B.*, who thereupon entered, and occupied jointly with him—it was held, that, by this agreement, and the joint occupation under it, the former tenancy was determined, although the lease contracted for was never granted; and *Hegan v. Johnson*, where the Court said (b): “When a person is so foolish as to enter upon the premises under an agreement for a lease, without a stipulation, that, in case no lease is executed, he shall hold for one year certain, if he does not execute, the landlord may turn him out without notice. The effect is, that *the lessor cannot distrain for the rent*: he must bring his action.”

Mr. Serjeant *Taddy* shewed cause, and contended, that the payments made by the plaintiff created a tenancy from

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(a) 3 Barn. & Cress. 478.

(b) 2 Taunt. 149.

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year to year, and fixed the amount of rent for which the defendant was entitled to distrain. The Court called on—

Mr. Serjeant *Wilde* to support his rule.—The terms of the tenancy were arranged with reference to a future lease. There was no distinct understanding at the time, that any definite sum was to be paid for rent. There was, consequently, no demise to support the distress. This is within the cases of possession taken with a view to a future demise, in which no distress can be made (a). Under such circumstances, a subsequent tenancy from year to year can only be created by the conduct of the parties. Here, there was no evidence whatever to warrant the finding of a tenancy from year to year, nor of any stipulated time of payment, or amount of rent to be paid. The plaintiff was a mere tenant at will, and not, as the learned Judge told the Jury, a tenant from year to year.

Lord Chief Justice BEST.—I do not mean to dispute the authority of the cases which have established that the mere circumstance of entering into possession of premises under an agreement for a future lease, does not, of itself, constitute such a tenancy as would enable the intended lessor to distrain for rent accruing before the execution of the proposed lease. These cases, however, do not shew that such a tenancy cannot be created where no lease is afterwards executed. An intermediate tenancy may be inferred from the circumstances. In this case, there was sufficient evidence from whence the Jury might infer the existence of such a tenancy as they have found, and I think they came to a right conclusion. The *quantum* of rent was taken for granted, at the trial, to be as alleged in the avowry. Whether the direction of the learned Judge were accurate or not, the verdict was war-

(a) See *Dunk v. Hunter*, 5 Barn. & Ald. 322.

ranted by the evidence. It was proposed between the parties that a lease should be prepared; and the plaintiff, before the lease was actually executed, entered into possession and continued in for three years. He had paid rent for two years, and promised to pay the arrears due at the time of the distress. It would be absurd to allow him then to say, that he was not tenant of the premises, but only held them in expectation of becoming tenant under a future lease. The facts of this case clearly distinguish it from those cited. We cannot disturb the verdict.

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Mr. Justice PARK.—The plaintiff held the premises for a period of three years. The length of time, therefore, puts an end to the question. If he had occupied for a less period than a year, the case would have been different; and the decision of the Court in *Hegan v. Johnson* would have governed this. There, the plaintiff was let into possession under an agreement for a future lease, and had been in only three quarters of a year; and the Court said: "The occupier certainly did not become tenant from year to year at the beginning of the first month or first three months; for, clearly, at any time before the end of the first year, if a lease had been tendered to the occupier, and he had refused to execute it, the lessor might have ejected him without any notice to quit; and if he had executed it, he would thenceforth have held, not under the supposed demise, but under the lease." The case of *Hamerton v. Stead* is not at all applicable. There, the original tenancy was put an end to by the new contract creating a joint-tenancy; and Mr. Justice *Littledale* said, that, "where parties enter under a mere agreement for a future lease, they are tenants at will; and, if rent is paid under the agreement, they become tenants from year to year, determinable on the execution of the lease contracted for, that being the primary contract." It is,

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therefore, clear that payment of rent, as proved in this case, creates a tenancy from year to year.

Mr. Justice BURROUGH.—Justice has been done here. The direction of the learned Baron, and the finding of the Jury, were both agreeable to law and to the facts of the case.

Mr. Justice GASELBE.—The agreement was void by the statute of frauds. The plaintiff, therefore, could, under the circumstances, only be in possession of the premises as tenant from year to year, entitled, on the one hand, to six months' notice to quit, and liable, on the other hand, to the usual process of distress for non-payment of rent.

Rule discharged (a).

(a) See the case of *Mann v. Lovejoy* (1 Ry. & Mood. 355), where it was held, that, where the occupier of premises under an agreement for a lease, at a certain rent, pays rent, he becomes *tenant from year to year* on the terms of the agreement, and the landlord may distrain. Lord Chief Justice Abbott (now Lord Tenterden) there said: "The question is, whether, when there is a continued occupation and payment of rent under such an agreement, this does not

constitute a tenancy from year to year, on the terms of that agreement. I am of opinion, that, taking the agreement, and connecting it with the facts proved, *there is a tenancy from year to year*, at the rent mentioned in the agreement, which tenancy the defendant (the landlord) could not determine without giving notice, and on which he may distrain for rent." That case was cited and approved in *Doe d. Tilt v. Stratton*, 1 Moore & Payne, 185.

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Friday,
Jan. 27th.

SAME v. SAME.

THIS was a replevin suit between the same parties as in the last case, for distraining a corn-rick standing in a field on *Hanbrook* farm.

The defendant avowed the taking for a half-year's rent alleged to be due at *Michaelmas*, 1824, under a demise to the plaintiff at the yearly rent of 188*l.*, payable half-yearly, at *Michaelmas* and *Lady-Day*.

The plaintiff pleaded *non tenuit*.

At the trial, before Mr. Baron *Graham*, at the last *Summer Assizes* for *Sussex*, it appeared that, at *Michaelmas*, 1824, the tenancy had been determined by a notice to quit; but that, by the custom of the country, as also by the terms of the original holding, the tenant was to have the use of the barns, gate-houses, &c., for the purpose of threshing out his corn and foddering his cattle, until the old *May-Day* following; that the defendant had obtained an injunction from the Court of *Chancery* to restrain the plaintiff from carrying off the premises corn in the straw; and that the corn-rick in question was distrained by the defendant in *January*, 1825.

It was contended for the plaintiff, that, as his interest in the premises was determined at *Michaelmas*, 1824, by the notice to quit, the distress was illegal, there being then no subsisting tenancy to warrant it under the statute 8 *Anne*, c. 14, ss. 6, 7 (a).

By the custom of the country, the tenant was to have the use of the barns, gate-houses, &c., of the farm, for a certain period after the end of the term, for the purpose of threshing out corn and foddering cattle. The tenancy was determined at *Michaelmas*, and the landlord, in *January* following, distrained a corn-rick for the rent due at *Michaelmas*, he having in the mean time obtained an injunction to restrain the tenant from carrying off the premises corn in the straw:—*Held*, that the holding by the tenant under the custom, though involuntary, was a prolongation of the original term; and that the landlord was entitled to distrain.

(a) By which—after reciting, that tenants *pur auter vic*, and lessees for years or at will, frequently hold over the tenements to them demised, after the determination of such leases; and that, after the determination of such or any other leases, no distress can by law be

made for any arrears of rent that grew due on such respective leases before the determination thereof—it is enacted, “That it shall and may be lawful for any person or persons having any rent in arrear, or due upon any lease for life or lives, or for years, or at will, end-

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A verdict was found for the defendant for 94*l.*, the rent claimed to be due; with liberty to the plaintiff to move to enter a verdict for him, should the Court be of opinion that the distress was not legal.

Mr. Serjeant *Wilde*, in the last Term, accordingly obtained a rule *nisi*.

Mr. Serjeant *Taddy* was about to shew cause, citing the cases of *Beavan v. Delahay* (a), and *Lewis v. Harris* (b), when the Court called on—

Mr. Serjeant *Wilde* to support his rule.—The plaintiff's interest in the farm was determined by his giving up possession on the notice to quit. The corn was not voluntarily left on the premises, but was detained there by the act of the defendant. If the plaintiff had claimed the right of keeping partial possession for the purpose of removing the way-going crops, the right of distress might have attached; but, as the corn in question was detained solely by force of the injunction obtained by the defendant, and against the will of the plaintiff, he ought not to be prejudiced thereby. The statute only authorizes a distress where the tenant continues in possession. Here, possession had been given up to the landlord, and the property of the tenant remained on the premises, not by his voluntary act, or for his benefit, but compulsorily.

ed or determined, to distrain for such arrears, after the determination of the said respective leases, in the same manner as they might have done if such lease or leases had not been ended or determined:—Provided that such distress be made *within the space of six*

calendar months after the determination of such lease, and during the continuance of such landlord's title or interest, and *during the possession of the tenant* from whom such arrears became due."

(a) 1 H. Blac. 5.

(b) *Ib.* 7, n.

Lord Chief Justice BEST.—The terms of the original contract between the parties created a tenancy from *Michaelmas* to *Michaelmas*. The custom of the country superadded an implied contract, that possession of part of the premises should be retained by the tenant, from the expiration of the term until old *May-Day* following, for the purpose of threshing out his corn and foddering his cattle. The question, then, is, whether, by virtue of this custom, the defendant had a right to distrain the plaintiff's corn within that period, for rent due at *Michaelmas*. The statute does not apply. The original tenancy was continued by the custom. The case of *Beavan v. Delahay* is decisive. There, it was held that a custom, that a tenant may leave his away-going crops in the barns, &c., of the farm for a certain time after the lease is expired and he has quitted the premises, is good; and that the landlord may *distrain* the corn so left for rent arrear, *after six months have expired* from the determination of the term; and Lord *Loughborough* said: "If, by tacit consent of the landlord and tenant, the contract between them continues beyond the time for which they originally contracted, all the rights and properties belonging to the original contract must also be continued. It has been often determined, that, if there be a lease, and, after the determination of it, the tenant holds over, he must hold upon the terms, and liable to all the conditions and covenants of the lease. The rights, therefore, of the landlord must in such case continue. Now, it is not material whether the interest and connection between the landlord and tenant be extended by such holding over, or by the operation of a custom like the present." I think this a sufficient authority to support the right of distress in the present case.

Mr. Justice PARK.—In the northern counties these cases are of frequent occurrence. Parties there are as

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often bound by particular customs as by their express agreements. In the case of *Boraston v. Green* (a), which was similar to the present, Mr. Justice *Bayley* considered the right reserved to the tenant to be a prolongation of the original term. In that opinion I fully concur. By the right conferred on the tenant by the custom, he continues in possession of the land in the same manner as he would have done under the terms of his express contract. This case is not within the statute of *Anne*; it is simply a case where the term is continued by the custom of the country.

Mr. Justice BURROUGH.—This custom arises from necessity, and is of peculiar benefit in the corn countries. It implies that the tenant will continue in possession for a certain period beyond the stipulated term. This implied contract, the tenant in the present case attempted to violate; and therefore the landlord restrained him by injunction. If, however, the tenant had succeeded in carrying away the crops, the contract created by the custom would not thereby have been avoided. A tenancy to *Michaelmas* was created by the express agreement of the parties. That tenancy was prolonged by the custom of the country. The fact that one party applied to the Court of *Chancery* to enforce the contract, does not in the least alter its nature. The statute of *Anne* is out of the question. The custom alone must govern us.

Mr. Justice GASELEE.—The only question here is, when does the tenancy end. The custom of the country decides that; and several cases have established such a custom to be good (b).

Rule discharged (c).

(a) 16 East, 71.

(b) See *Wigglesworth v. Dallison*, 1 Doug. 201.

(c) See also *Nuttall v. Staunton*, 4 Barn. & Cress. 51, where, a tenant, by permission of the land-

lord, remaining in possession of part of a farm after the expiration of the tenancy, it was held, that the landlord might distrain on that part, within six months after the

expiration of the tenancy; the statute of *Anne* not being confined to a tortious holding over, or to the holding of the whole farm

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HOMAN v. TIDMARSH, sued as TINMARSH.

Wednesday,
Jan. 26th.

MR. Serjeant *Vaughan* applied for a rule calling on the plaintiff to shew cause why the writ issued in this cause and all subsequent proceedings thereon, should not be set aside for irregularity, and why the bail-bond given by the defendant on his arrest should not be delivered up to be cancelled. The alleged irregularity was, that the defendant, whose name was *Tidmarsh*, had been arrested by the name of *Tinmarsh*. The learned Serjeant submitted that this was such a misnomer as would warrant the summary interference of the Court, and that the present case was clearly to be distinguished from that of *Ahitbol v. Beniditto* (a), where, the defendant having been arrested by the name of *Benedetto*, the Court, on a similar application to this, refused to interfere, on the ground that the names were *idem sonantes*.

The defendant's name was *Tidmarsh*; he was arrested as *Tinmarsh*:—The Court refused to set aside the writ, but left him to plead.

Per Curiam.—Let the defendant plead the misnomer in abatement.

The learned Serjeant took nothing (b).

(a) 2 Taunt. 401. (b) See also *Stockdale v. Blenkin*, 1 Price, 277,

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Thursday,
Jan 26th.

DOE, on the several demises of CLARK and Others, v.
SPENCER.

The Court refused to stay the proceedings in an action of ejectment brought on the demise of the provisional assignee of the Insolvent Debtors' Court, on the ground of the absence of proof of the consent of the major part of the creditors, and approbation of one of the commissioners, or order of the Court, as required by the statutes 1 Geo. 4, c. 119, s. 11, and 3 Geo. 4, c. 123, s. 2.

THIS was an action of ejectment. At the trial, before Lord Chief Justice *Best*, at *Westminster*, at the Sittings after last *Trinity* Term, a verdict was entered for the lessor of the plaintiff, on the demise of *Henry Dance*, the provisional assignee of the Court for the Relief of Insolvent Debtors.

In *Michaelmas* Term last, Mr. Serjeant *Wilde* applied for a rule *nisi*, that this verdict might be set aside, and a nonsuit entered, on the ground that the provisional assignee was not in a situation to maintain an ejectment, not being armed with the authority required by the statute 1 Geo. 4, c. 119, ss. 7 and 11—by the former of which it is provided, that, on the prisoner's discharge, all his estate and effects which were vested in the provisional assignee, shall be assigned by him to an assignee to be appointed by the Court; and by the latter—that no suit at law be proceeded in further than an arrest on mesne process, by any assignee of the prisoner's estate, without the consent of the major part in value of the creditors, and the approbation of one of the commissioners of the Court; and also by the statute 3 Geo. 4, c. 123, s. 2, which enacts “that it shall be lawful for the provisional assignee to sue in his own name, *if the said Court shall so order*, for the recovery, obtaining, and enforcing, of any estate, debts, effects, or rights, of any such prisoner.”

The Court thought that proof that the action was brought with the consent of the major part in value of the creditors, and the approbation of one of the commissioners, or by the order of the Court, could not have been required at the trial. The rule, therefore, was refused (a); but the Lord Chief Justice, in delivering the

(a) *Vide ante*, p. 7; S. C. 3 Bing. 203.

opinion of the Court, said (a)—“If an action be brought without a proper authority, this Court might, perhaps, stay the proceedings on motion, or the Court for the Relief of Insolvent Debtors might order the provisional assignee, as their officer, to discontinue or suspend it.”

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Mr. Serjeant *Wilde*, in this Term, obtained a rule *nisi* to stay the proceedings.

Mr. Serjeant *Lawes* now shewed cause, submitting that the application should have been made before verdict, in accordance with the authority of *Leigh v. Kent* (b), where the Court of *King's Bench* refused, *after verdict*, to stay the proceedings in an action of debt on a penal statute, although there was no affidavit that the offence was committed within the county where the action was brought, and within a year before its commencement, in pursuance of the statute 21 *Jac.* 1, c. 4. The learned Serjeant also contended that the motion was improperly made in this Court; and that, at all events, it could only be entertained by the commissioners of the Insolvent Debtors' Court, who alone had power to control the acts of their officers.

Mr. Serjeant *Wilde*, in support of his rule.—An application to the Insolvent Debtors' Court would be of no avail, for that Court could not order the proceedings of this Court to be discontinued. The sections of the statutes referred to are decisive to shew that neither the provisional assignee of the Insolvent Court, nor the after-appointed assignees, are, in any case, authorized to proceed in any action at law, or suit in equity, beyond certain defined stages, without having previously obtained the consent of the major part in value of the creditors of the insolvent, as

(a) *Ante*, p. 13.

(b) 3 Term Rep. 362.

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well as the approbation of one of the commissioners of the Court, or the order of the Court itself. The case of *Chalmers v. Page* (a), is an authority to shew that an assignee cannot take an equitable interest in the property assigned to him, independently of the legal interest.

Lord Chief Justice BEST.—This application is made to the Court under the *eleventh* section of the statute 1 Geo. 4, c. 119, and the *second* section of the statute 3 Geo. 4, c. 123: the former enacts that no suit at law be proceeded in further than an arrest on mesne process, by any assignee of a prisoner's estate, without the consent of the major part in value of the creditors, and the approbation of one of the commissioners of the Court; the latter, that it shall be lawful for the provisional assignee to sue in his own name, *if the Court shall so order*, for the recovery, obtaining, and enforcing, of any estate, debts, &c., of the insolvent. We have already decided, on a motion to set aside the verdict in this case (b), that it was not incumbent on the plaintiff to prove at the trial, that the action was brought with the consent of the major part in value of the creditors, or with the approbation of one of the commissioners, or by the order of the Court. The principal objects of the Legislature in the passing of these statutes evidently were, to convey to the provisional assignee, in the first instance, and afterwards to the assignees who might eventually be appointed, the legal estate in the effects of the insolvent, and to secure the creditors from an improvident expenditure of his estate; not to furnish an unjust defence to parties sued by the provisional or after-appointed assignees. This defendant has no right, in any Court, to be heard on the objections he has now urged. I do not say that this Court has not power to stay proceedings in such

(a) 3 Barn. & Ald. 697.

(b) *Ante*, p. 7.

a case as this, where the assignee appears to have acted without the authority he is required to have; but then it should be on the application of a creditor, and we should require to be shewn a very strong case: and as the Court of Insolvent Debtors clearly have power to control the acts of their own officers, the application would be better made to them, they having the means of estimating the propriety of the proceedings, and of ascertaining whether or not the suit be calculated to benefit the estate; whereas, if we interfere, we might unconsciously be doing it injury. It has been truly said, that the Insolvent Debtors' Court cannot stay proceedings here; but there is nothing to prevent their ordering their officer to do that which they see advisable. The Lord Chancellor has no power to prevent a Court of law from proceeding in any case; his authority can only be exercised on the parties who urge such proceedings in defiance of his injunction. Where a suit has been commenced by the assignees of a bankrupt without the concurrence of the creditors, the practice is to restrain them for the future, but not to stay the proceedings. I am of opinion that this rule should be discharged.

Mr. Justice PARK, and Mr. Justice BURROUGH concurred.

Mr. Justice GASELEE.—In *Ex parte Whitchurch* (a), the Lord Chancellor expressed his disapprobation of the conduct of the assignee of a bankrupt, in suing without authority; still he did not stay the proceedings; he merely restrained the assignee from future acts. Here, the legal estate in the insolvent's property was clearly vested in the provisional assignee of the Insolvent Court; he, therefore, was legally entitled to maintain the action. If he has improvidently or improperly instituted the suit, he is amen-

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(a) 1 Atk. 210.

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able to the Court whose officer he is; they have the best means of judging in such a case as this.

Rule discharged (a).

(a) See *Willes v. Elliott*, (1 Moore & Payne, 19; S. C. 4 Bing. 392), where the assignment executed by an insolvent on filing his petition, was held so completely to vest all

his estate in the provisional assignee, that the insolvent's death before the day of hearing did not avoid it.

Friday,
Jan. 27th.

On the day appointed for the trial of a writ of right, the sheriff returned that one of the knights was, from illness, incapable of attending; this was confirmed by the affidavit of his medical attendant.—The Court allowed a *venire* to issue, for summoning another knight, and a *habeas corpora* to compel the appearance of the three knights who had already appeared, and of the recognitors, on a subsequent day.

TOOTH, Demandant; BAGWELL, Tenant.

THIS being the day on which the trial at bar of a writ of right between the above parties was appointed to be had, the Secondary proceeded to call the grand assize. The first of the knights appeared; on the second, Sir *George Alderson*, being called, a medical gentleman made oath that he was too ill to attend, and that the state of his health was such as to render it highly improbable that he would be able to appear on any adjournment day in the Term. After some preliminary conversation, the Lord Chief Justice directed that it should be made to appear on the Sheriff's return to the writ, that it had been stated on oath that Sir *George Alderson*, one of the knights, was ill and unable to attend, and likely to continue so. The other two knights appeared, as did also most of the Jurors, some being, for various reasons, excused. The tenant's counsel refusing to allow the trial to proceed in the absence of one of the knights—

Mr. Serjeant *Bosanquet* and Mr. Serjeant *Taddy* moved (a)—that the process issued for chusing and summon-

(a) The learned Serjeants proposed, in the first instance, to

move for a rule *nisi*; but the Lord Chief Justice observed, that rules

ing the grand assize should be taken off the roll; and that a new *venire*, with an entry of continuances, should be issued, for summoning four knights to chuse the grand assize; or, that the demandant should be at liberty to enter a suggestion, stating the inability of Sir *George Alderson* to attend, by reason of sickness and bodily infirmity; and that Sir *George* should be discharged from attending, and a *venire* be issued to summon another knight in his stead, and a *habeas corpora* to compel the attendance of the other three knights, and the recognitors already chosen.

The learned Serjeants submitted, that the Court had power to adopt either of these courses, in order to prevent an entire failure of justice. They referred to the case of *Lord Windsor v. St. John* (a) and the *Year Book* (b), to shew that a rule in the latter alternative had been granted on the death of one of the knights; and cited *Rex v. Cowle* (c) for the purpose of shewing, that, where a *venire* out of the usual course of practice is required, it is necessary first to enter a suggestion of the ground of the application. In that case, the party desired to enter a suggestion for the purpose of having a *certiorari* issued into a new county, laying, as one of the grounds of his application, that, from certain circumstances, he could not hope to have a fair trial in the town of *Berwick-upon-Tweed*, whence the process originally issued; and Lord *Mansfield*, in delivering the opinion of the Court, said: "The law is clear and uniform as far back as it can be traced. Where the Court has jurisdiction of the matter, if from any cause it cannot be tried in the place, it shall be tried as near as may be. All local matters arising in *Wales*, triable in this

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to shew cause were entirely of modern introduction, and that, as the present case was one of antient practice, he doubted whether the modern ought to be engrafted on it; at all events, he said, the Court

might require the application to be answered at once.

(a) Dyer, 98.

(b) 22 Edw. 3, fol. 18.

(c) 2 Burr. 859.

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Court, are, by the common law, tried by a Jury of the next county in *England*. So, as to the *Cinque* ports, the *venire facias* shall be awarded *de vicineto*, of the next vill, either in the county of *Kent* or the county of *Sussex*. So it is also as to the Isle of *Ely*. So, likewise, as to *Ireland*, a *venire* was directed to the sheriff of *Salop*, as the next *English* county. So, in parts of *England* itself, where an impartial trial cannot be had in the proper county, it shall be tried in the next." It is, therefore, clear that the Court may exercise a jurisdiction over its own process.

Mr. Serjeant *Vaughan* and Mr. Serjeant *Wilde*, *contra*.—It is altogether a matter of discretion with the Court, whether they will or will not exercise a jurisdiction in favour of what has always been deemed a vexatious proceeding. The disinclination of the Court to facilitate a demandant in a writ of right was strikingly manifested in the case of *Adams*, demandant; *Radway*, tenant (a); where, on a motion to quash a writ of summons, on the ground that due notice of executing it had not been served on the attorney for the tenant, Lord Chief Justice *Gibbs* said, that the rule which had been adopted on consideration, was, that, as a writ of right generally sought to disturb a possession which had continued for a considerable length of time, the Court would not assist the demandant in getting over any difficulties that might occur to him; and Mr. Justice *Heath* also said, that it was in general a very vexatious proceeding: the motion, therefore, was negatived. The Court will not, unless fettered by precedent, accede to the present application. In a case of this nature, the mode of trial is by a Jury of *sixteen*, composed of *four* knights and *twelve* recognitors—persons chosen by the knights. The trial cannot be had in any other way; and,

(a) 1 Marsh. 602.

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although one of the knights might be prevented by sickness from attending, if living, none other can be substituted for him. In the case referred to, one of the knights was dead; besides, there, the knights had not made their election of recognitors, as here. There is, therefore, a material difference between that case and the present. A mere temporary illness is suggested here, with the improbability of the knight's being of ability to attend during the term. This is not a case for favour. What the Court will be disposed to grant, is merely *ex debito justitiæ*, not as a matter of indulgence. In the case in the *Year Books*, the only question was as to the proper process—whether a *distringas* or a *habeas corpora* should issue. If this had been the case of the death of one of the knights or recognitors, it might have been different; but nothing short of the absolute impossibility of attendance could warrant the Court in acceding to this application. If they do so, injustice will be done to the tenant. On the grounds, therefore, of inexpediency, of the absence of all precedent, and of the peculiar nature of the proceeding, the objections to the exercise of any discretion which the Court may have, are so powerful, that, without better grounds than have been shewn, they will not afford any facility to the demandant.

Lord Chief Justice BEST.—It has been strongly pressed upon us in this case, that the proceeding by writ of right is vexatious, and of a nature not to be favoured by the Court. That argument assumes too much; for, how desirable soever we may think it that the period allowed for bringing such a writ should be narrowed, still there may be cases in which a long delay in asserting a right is unavoidable. The Legislature seemed to feel this, when they limited the time for bringing an ejectment to *twenty* years, leaving the proceeding by writ of right to be taken as before. Rights to easements are established by twenty years' enjoyment, and they are destroyed by non-user for a like

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period. It would be very desirable, in my opinion, that titles to real property should be rendered indefeasible as soon as may be; and that the time for bringing a writ of right should be shortened, and the mode of prosecuting it rendered less complicated. But, whilst the present mode of proceeding is conformable to the existing law, the Court cannot call it vexatious, or throw any obstacle in the demandant's way. It has undoubtedly been said by the Judges, on various occasions, that they would not assist a demandant; but that was where he had been guilty of *laches*, and had applied to the Court for leave to amend a mistake (*a*). The case is different where the delay is occasioned by the act of God; the Court may then interpose; for *actus Dei nemini facit injuriam*. Here no blame is attributable to the party. The demandant is prevented from proceeding by the illness of one of the knights; and it appears from the Sheriff's return, and also from the affidavit of his medical attendant, that it is not probable that his health will permit him to attend on any adjournment day within the Term. We cannot postpone the trial in the hope of Sir George's recovery, neither are we to wait till his death before we summon another knight in his stead. We have, it is true, no precedent to guide our decision; but good sense will direct us.

Two modes of relieving the demandant are pointed out to us—the *first* is, that the process issued for chusing and summoning the grand assize should be taken off the roll; and that a new *venire*, with an entry of continuances, should

(*a*) In *Maidment v. Jukes* (1 New Rep. 429), where the demandant in a writ of right prayed to be allowed to discontinue, on account of the omission of one step in a descent, the Court refused to assist him. See also

Dummsday v. Hughes, 3 Bos. & Pul. 453; *Charlwood v. Morgan*, 1 New Rep. 66; *Baylis v. Manning*, Id. 233; *Hull v. Blake*, 4 Taunt. 572; and *Tooth v. Boddington*, *ante*, Vol. 8, p. 42; S. C. 1 Bing. 208.

be issued for summoning four knights to chuse the grand assize—the *second*, that the demandant should be at liberty to enter a suggestion, stating the inability of Sir *George Alderson* to attend, by reason of sickness and bodily infirmity; and that Sir *George* should be discharged from attending, and a *venire* be issued to summon another knight in his stead, and a *habeas corpora* to compel the attendance of the other three knights, and the recognitors already chosen.

The first is unnecessary, for we have already a good grand assize, with the exception of a knight. I, therefore, think the latter mode preferable, *viz.* to issue a *venire* for another knight, and a *habeas corpora* to compel the attendance of the other three, and of the recognitors already elected. We are not quite without authority on this point. The case in the *Year Books*, though containing mere *obiter dicta*, is sufficient for the purpose, these *dicta* falling from persons familiar with the subject, which at that time was of more frequent occurrence. I feel the less hesitation, as our decision will be subject to the review of a Court of error. In the *King v. Cowle*, Lord *Mansfield* said, that every Court has authority to control its own process. This general rule admits of no exception; its observance is perhaps more essential in a writ of right than in any other case. In *Lord Windsor v. St. John*, one of the knights died; and one of the Judges said, that, in such a case, it was the practice to do that which it is proposed to do in this instance. A distinction has been taken by the counsel for the tenant, between that case and the present, on the ground that there the knight was dead, whilst here the incapacity to attend may be only temporary. But it seems to me that what has been done in the case of the death of one of the knights, may with equal reason be done in the case of his permanent inability to attend, through sickness. I, therefore, think that Sir *George Alderson*

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should be discharged from attending, and the *venire* and *habeas corpora* issued as prayed.

Mr. Justice PARK.—I am of the same opinion. It is true that this case is not exactly parallel with that which has been presented to us as an authority. But the principle is the same, whether the attendance of the party be rendered impossible by death, or merely by sickness. According to this view we have already this day acted, in excusing the attendance of some of the recognitors who were sworn to be from illness incapable of attending. The case of *Adams* and *Radway* has not the least bearing on this. There, the party had been guilty of *laches*, and was not a fit subject for the indulgence of the Court.

Mr. Justice BURROUGH.—As long as the writ of right is a proceeding recognized by the law, we are bound to entertain it. It is not for the Court to throw any obstacles in the way of the demandant. Where, indeed, he has been irregular, the Courts have declined to shew him favour. If, however, the act of God imposes a hardship, it is always a case for the interference of the Court. Here, it is sworn, that one of the knights is in such a precarious state as to render it highly improbable that we can have his attendance at any time in this Term. He is, therefore, for this purpose, as if he had ceased to exist.

Mr. Justice GASELER.—Granting the application in the terms first proposed might be an indulgence to the demandant; but not so as to the alternative. I do not apprehend that there can be any error in stating upon the record that which is suggested; and, as it clearly appears that there is no probability of our obtaining the attendance of Sir *George Alderson*, there can be no reason why another knight should not be summoned in lieu of him.

A day must be given to the parties to appear in three weeks of *Easter*; and the rule for a *venire* to summon another knight, and a *habeas corpora* to compel the attendance of the other knights and the recognitors, must be made—

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SCAMAN and Others v. MAW.

Saturday,
Jan. 28th.

THE following case was sent by his Honour the Vice Chancellor, for the opinion of the Judges of this Court:—

“ *Mary Bullen*, the wife of *Philip Bullen*, was entitled to a certain copyhold tenement, consisting of a messuage, with the out-buildings, and *fifty-six* acres of land, within and parcel of the manor of *Greetham* in the county of *Lincoln*.

A surrender of copyhold premises made by a married woman to her husband, in his presence, and with his assent, testified by his immediate admittance under it; she having been first solely and secretly examined by the steward:—
Held valid.

At a Court Baron and Customary Court holden in and for the said manor, on the 10th day of *December*, 1795, by the steward of the said manor, the said *Mary Bullen* was duly admitted to the said tenement, to hold to her and her heirs, at the will of the lord, according to the custom of the said manor, by the accustomed rents and services; and immediately afterwards, at the same Court, the said *Mary Bullen*, being first solely and secretly examined by the said steward, did surrender into the hands of the lord of the said manor, by the acceptance of the said steward, the said tenement, to the use of the said *Philip Bullen*, his heirs and assigns, for ever; to which said *Philip Bullen*, then personally present in full Court, the lord of the said manor, by his said steward, did grant thereof seisin by the rod, according to the custom of the said manor, to have and to hold the said tenement and premises unto him the said *Philip Bullen*, his heirs and assigns, for ever, at the will of the lord, according to the custom of the said manor, by the accustomed rents and services; and

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the said *Philip Bullen* thereupon paid the fine payable for such admittance, and did fealty, and was admitted accordingly. There is no special custom in the manor of *Greetham*, as to the surrender of copyhold estates belonging to *femes covertes*."

The question for the opinion of the Court was—Whether the aforesaid surrender made by the said *Mary Bullen* to the use of her husband the said *Philip Bullen*, was a valid surrender of the said copyhold tenement to the use of the said *Philip Bullen*, his heirs and assigns.

The case now came on for argument.

Mr. Serjeant *Wilde*, for the plaintiffs.—This was a valid surrender. The wife was admitted on the 10th *December*, 1795; her surrender and the admittance of her husband took place at the same Court, the husband paying the fine. These facts establish the cognizance of the husband, and his assent, which is equivalent to his joining in the surrender. It is clear that the husband and wife together, may, without any special custom, make a valid surrender. The object of the husband's joining is only for the protection of his interest; none other can be assigned. Here, the entire interest in the estate was in the wife, and she had been admitted tenant. The acts of the husband, therefore, could neither forfeit nor convey any title. The wife was the only person who could pass any beneficial interest. Her admittance, notwithstanding her coverture, marked the absence of any legal interest in her husband; and the fealty was done by the husband alone. By joining in the surrender, the husband could do no more than give efficacy to the wife's act; his assent would have the same effect. In *Compton v. Collinson* (a), a married woman was living separate from her husband, under a deed, by which he covenanted that she should enjoy, to

(a) 1 H. Blac. 334.

her own use, all the property that should come to her during the coverture, and that he would join in any uses she might think fit to appoint. After the separation, a copyhold estate descended to her; she surrendered it without her husband; and it was objected, that the surrender was therefore not valid: but the Court held, that the covenants into which the husband had previously entered, in the deed of separation, must be taken to be a sufficient expression of assent by him to the acts of his wife. So, here, as the assent of the husband was given at the moment, and his admittance was contemporaneous with the surrender, the whole must be taken as one transaction, and the surrender and admittance consequently deemed valid.

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Mr. Serjeant *Bosanquet, contra.*—A *feme covert* may, independently of any special custom, after being privately examined by the steward, surrender her copyhold estate to the use of her husband, he joining in the conveyance; and it has been held, that a special custom allowing the wife alone to make the surrender, with the assent of her husband, without his actually joining in it, might also be good. Here, however, no special custom is stated; the question, therefore, is, whether, in such case, the wife's surrender at a Court at which the husband was present, is good. To be valid, the surrender must be made so as to pass the estate to the lord, through whom the person admitted would derive his right. In *Compton v. Collinson*, the *feme* was virtually *sole*, she being by deed separated from her husband, who had, by his own act, formally renounced all interest in her separate property. In *Stevens d. Wise v. Tyrrel (a)*, a custom for a wife to surrender her copyhold lands without the assent of her husband,

(a) 2 Wils. 1.

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was held to be bad, and Lord Chief Justice *Willes* there observed: "It was said, that, if a *feme covert* levies a fine, it shall bind her and her heirs, if the husband does not enter and avoid the estate of the conusee, because she was examined, and had power over the land (a). But the reason given in *Hobart* (b) is, that she is estopped to say she was *covert*; and a fine levied by a *feme covert* of freehold lands was compared to a surrender by her in fee of copyhold lands entailed, whereof no fine can be levied, and which would bar the issue; and this at first seemed to have some weight with the Court: but at length they resolved that this custom cannot be supposed to have had any reasonable commencement; that it is contrary to law and the policy of the nation, and tends to make wives independent of their husbands; and that no tolerable reason was given at the bar for the custom." In *Taylor v. Philips* (c), a wife, seised of copyhold lands, in the presence of her husband, but without his joining, surrendered them to the use of her will. Lord *Hardwicke* at first thought that the surrender might be good by special custom; but, in his judgment, he said: "I am doubtful, abstracted from the custom, how far this can be a good surrender to the use of the will. The person must take the lands by the surrender, of which the instrument of appointment only directs the uses; because he must come in under the estate of the lord, and by that *medium*. It makes no difference that this passes no interest at the making; because there must be a surrender of the estate into the hands of the lord, to make it take effect immediately, or *in futuro*, by the appointment to be made. It is not material whether the uses are to arise immediately, or by subsequent act of appointment, for it must be by the surrender; and, in order to that, the estate must pass into the hands of the

(a) 10 Rep. 43 a.

(b) Hob. 225.

(c) 1 Vez. 229.

lord, through which it must be taken. The question, then, is, whether the wife can surrender that estate into the hands of the lord, so as to make it effectual. A fine differs from the case of a surrender, for that will be good against the heir by estoppel, although it passes no estate at all; but, if a surrender is not good, there will be no estoppel, and no estate can pass into the hands of the lord." In *Compton v. Collinson*, the Court regarded the acts of the wife, she being separated from her husband, in the same light as they would have done had she been *sole*. Mr. Justice *Buller* said (a): "The principal question to be considered is, what was the effect of the deeds of separation. Another question is, whether, without any custom, the surrender was good; which is a legal question, and new, and well deserving consideration;" and when that case afterwards came before this Court, Lord *Loughborough*, in delivering judgment, said (b): "The main and substantial ground of the case is, that the wife is the tenant of the copyhold, and not the husband; that the estate can be forfeited or surrendered only by her acts, not by his; that the authority which he acquires by his marital rights, to direct and control her acts, is, by his covenant, in the present instance annulled, or at least suspended." The whole case turned upon that argument; but it is now clearly established that a mere separation cannot operate a suspension of the marital rights. All the cases on the subject are collected in a note by the editor of *Brown's Chancery Cases* (c); from these it clearly appears that the doctrine that once prevailed, of considering a *feme covert* living apart from her husband in the light of a *feme sole*, is now no longer recognized. The rules of conveyancing are strict and technical; the mere presence of the husband in Court at the time of the sur-

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(a) 2 Bro. Ch. Cas. 384.

(b) 1 H. Blac. 351.

(c) Eden's Edit. Vol. 2, p. 377, n.

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render, could not, of itself, render that surrender a valid conveyance of the estate. As, therefore, no custom is shewn, to authorize the surrender here made, it cannot be supported.

Cur. adv. vult.

The following certificate was afterwards sent to the Vice Chancellor:—

“ Having heard this case argued by counsel, and considered it, we are of opinion that the surrender made by the said *Mary Bullen* to the use of her husband the said *Philip Bullen*, having been made in his presence, and with his assent, testified by his immediate admittance under it, and she having been first solely and secretly examined by the steward, was a valid surrender of the said copyhold tenement to the use of the said *Philip Bullen*, his heirs and assigns.

W. D. BEST.

J. A. PARK.

J. BURROUGH.

S. GASELEE.”

Saturday,
Jan. 28th.

COLLINS and Another v. WALLIS.

An affidavit of debt stated that the plaintiffs had furnished goods to the amount of 2,000*l.* to one *N.*, for whom the defendant undertook to be answerable; that *N.* had since failed, and paid a dividend of four shillings in the pound only; and that 1,600*l.* remained due to the plaintiffs:—*Held* sufficient.

MR. Serjeant *Wilde* moved for a rule calling on the plaintiffs to shew cause why the bail-bond, which had been given by the defendant in this case, should not be delivered up to be cancelled, on the ground that he had been arrested and held to bail for unliquidated damages. The affidavit of debt stated, that the defendant had applied to the plaintiffs to furnish coals to the amount of 2,000*l.* and upwards to one *Nicholls*, for whom the defendant undertook to be answerable; that *Nicholls* had since failed, and paid a dividend of *four shillings* in the pound only; whereby a sum of 1,600*l.* remained due to the plaintiffs. The learned Serjeant contended, that, as the defendant was,

at all events, only collaterally liable, and as the damages were unliquidated until assessed by a Jury, the defendant could not legally be held to bail.

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Per Curiam.—To constitute a case of unliquidated damages, the debt must be of such a nature that its amount cannot be ascertained but by the intervention of a Jury. That is not the case here. The amount due to the plaintiffs on the defendant's undertaking, is as clearly ascertainable as if the goods had been delivered to the defendant himself.

Rule refused (a).

(a) See *Cope v. Joseph*, 9 Price, 155.

KINDERLEY, Demandant; GRAHAM, Tenant; OGLE, Vouchee.

Wednesday,
Feb. 1st.

MR. Serjeant *Bosanquet* moved that this recovery might be amended. It was suffered in the year 1798. In the deed to lead the uses, the property, which consisted of two acres and a half of land, was described as "situate in the parish of *Abbotsworthy*, in the county of *Southampton*, in the common field of *Abbotsworthy* aforesaid." The recovery was suffered as of land in *Martyrsworthy*. It appeared that the descriptions in both were wrong; there being no such *parish* as *Abbotsworthy*, and the land being, in fact, situate in the *township* of *Abbotsworthy*, in the parish of *Kingsworthy*. The amendment prayed was, the substitution of "the township of *Abbotsworthy*, in the parish of *Kingsworthy*," for "the parish of *Abbotsworthy*." The learned Serjeant produced affidavits identifying the property as that intended to pass by the deed, and stating

The Court permitted a recovery to be amended by substituting "the township of *A.*, in the parish of *K.*," for "the parish of *A.*"

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KINDERLEY
Demandant;
GRAHAM,
Tenant.

that, ever since the recovery was suffered, the possession had gone with the deed.

Fiat (a).

(a) See also *Willis*, demandant; *Calvert*, tenant; *Bartholomew*, vouchee, 1 B. Moore, 131.

Friday,
Feb. 3rd.

DOUGALL v. KEMBLE and Others.

By bills of lading, goods were made deliverable "to C. & Co., or to assigns, he or they paying freight for the same." C. & Co. indorsed the bills to the defendants, brokers, and afterwards became bankrupt. The brokers for the ship, in ignorance of the insolvency of C. & Co., and of their having indorsed the bills to the defendants, applied to the former for payment of freight; and afterwards sued the defendants:—*Held*, that the latter were liable for the freight, on a general *indebitatus assumpsit*:—*Held* also, that a party who obtains goods under a bill of lading, impliedly contracts to pay the freight.

THIS was an action of *assumpsit* to recover the freight and primage of sugars conveyed by the plaintiff from the *West Indies* to *London*.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last *Trinity* Term, a verdict was found for the plaintiff, damages 200*l.*, subject to the opinion of the Court on the following case:—

"The brig *Pursuit*, whereof the plaintiff was the owner, took in a cargo of sugars at the island of *St. Lucia*, and arrived with the same in the *West India* Docks, where the cargo was afterwards landed and warehoused. Sundry hogsheads of sugar, forming part of the cargo, were marked C. L., others F. D., and others M. D. Bills of lading were signed by the captain of the ship for the sugars in question; by two of which, the portions of sugar marked F. D. and M. D. were made deliverable to the shippers' orders, or to assigns, he or they paying freight for the same, with primage and average accustomed. By the third, the sugars marked C. L. were made deliverable to *J. R. Le Cointe & Co.*, or to assigns, he or they paying freight for the same, with primage and average accustomed.

"The bill for the sugars marked F. D. was indorsed—

" ' Deliver the within hogsheads of sugar to Messrs. *Le*

Cointe, & Co., provided they accept my draft of this day's date, in favour of Messrs. *D. Ferguson & Co.*, for 200*l.* sterling, at ninety days' sight, otherwise, to the holder of the said draft.

(Signed)

Salvigny.'

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“ ‘ 18th *September*, 1824.’

“ The bill of exchange referred to by the bills of lading was duly accepted by *Le Cointe & Co.* previously to the Bills of lading being handed to them.

“ The sugars marked F. D. and M. D. were entered on the 9th *November*, 1824, by the owner of the ship, at the Custom-House, to be warehoused, in pursuance of the statute 4 *Geo.* 4, c. 24.

“ On the same day, the captain, on the part of the owner of the ship, gave notice to the directors of the *West India* Dock Company to stop the sugars F. D. and M. D. till the freight was paid.

“ The sugars marked C. L., deliverable by the bills of lading to *Le Cointe & Co.*, were not then stopped as were the others.

“ On the 25th *November*, and 10th and 13th *December*, respectively, the defendants presented at the *West India* Dock office the three bills of lading before mentioned, the one of which, for the sugars marked C. L., had been previously indorsed and delivered by *Le Cointe & Co.* to the defendants; and the two bills of lading for the sugars marked F. D. and M. D. had been indorsed by the shippers to *Le Cointe & Co.*, and had also been indorsed and delivered by *Le Cointe & Co.* to the defendants; and under and by virtue of the bills of lading, and indorsements thereon, the defendants obtained the transfer of the sugars into their names in the warehouse and books of the Dock Company.

“ On the 16th *November*, the defendants' clerk applied

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to Messrs. *Robertson & Co.*, who were brokers for the ship, on account of the plaintiff, and requested that the stop which had been put upon the sugars, in pursuance of the captain's notice before mentioned, might be taken off from the sugars marked F. D. and M. D., and that the said sugars might be delivered out of the Docks; and Messrs. *Robertson & Co.* thereupon signed an order, addressed to the collector of the *West India Dock Company*, withdrawing the stop, and desiring that the goods in question might be delivered to *Le Cointe & Co.*, the consignees thereof, or their assigns.

" This order was brought by the defendants' clerk to the dock collector.

" On the 16th *December*, *Le Cointe & Co.* suspended their payments; on the 1st *January*, 1825, they committed acts of bankruptcy; and on the 5th *January*, a commission of bankrupt was issued against them, which was inserted in the *Gazette* of the 8th *January*.

" The plaintiff's brokers, who collected the freight of the ship on account of the plaintiff, on or about the 4th *January*, in the usual course, sent an account of the freight-note to Messrs. *Le Cointe & Co.*, charging them as debtors for the same. Up to and at this time, the brokers did not know that the bills of lading had been indorsed by *Le Cointe & Co.* to the defendants, or that *Le Cointe & Co.* had suspended their payments, or had committed any acts of bankruptcy.

" On the 8th *January*, the plaintiff's brokers applied at *Le Cointe & Co's.* for payment of the freight, and were then first informed of their having suspended their payments.

" And the plaintiff's brokers, on the same 8th *January*, first learnt, by inquiring at the *West India Dock* office, that the bills of lading had been indorsed to the defendants. The brokers thereupon applied for and obtained

back the freight-note from *Le Cointe & Co.*, and, on the 8th of *January*, delivered a freight-note to the defendants, charging them as debtors for the same.

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“ On the 10th and 11th *January*, 1825, Messrs. *Robertson & Co.* and the plaintiff gave further notice to the directors of the Dock Company, countermanding the withdrawal of the stop for freight, and ordering all the goods to be detained.

“ The sugars were subsequently delivered out of the Docks to the order of the defendants, who paid the dock-dues for landing all the sugars, which included three months' warehouse-rent for the same, from the time of landing.

“ The freight for the sugars, according to the bills of lading, was—

	£	s.	d.
For sugars marked C. L.	38	12	10
Do. F. D.	85	19	8
Do. M. D.	1	6	10
	<hr/>		
	£125	19	4
	<hr/>		

which freight, according to the course of trade, was payable on the *Saturday* upon or next after the expiration of two months from the ship's report, *viz.* on the 15th *January*, 1825.

“ The defendants were sugar-brokers in the city of *London*, employed by *Le Cointe & Co.* to sell the sugars in question, and had advanced *Le Cointe & Co.* sums of money on account thereof at the times the bills of lading were delivered to them as aforesaid.

“ The defendants, in their account with *Le Cointe & Co.*, debited them with the amount of payments made by the defendants in respect of the sugars, and paid over to the assignees of *Le Cointe & Co.* (subject to the decision of this question) the balance of the proceeds of the sale of the sugars, after deducting such payments, and the charges

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of sales, and also after deducting the advances which they had made, and the amount of the freight claimed in the present action."

The question for the opinion of the Court, under the above circumstances, was—Whether the plaintiff was entitled to recover the whole or any part of the sum of 125*l.* 19*s.* 4*d.*, and the verdict was to be entered accordingly.

The case now came on for argument.

Mr. Serjeant *Wilde*, for the plaintiff.—The facts are few and clear. The sugars were by the bills of lading made deliverable to Messrs. *Le Cointe & Co.*, the consignees, or their assigns, he or they paying freight for the same. The defendants received them with notice that the freight was unpaid. The fact of the plaintiff's brokers having, in the first instance, made application for payment of freight to *Le Cointe & Co.*, cannot affect his right as against the holder of the bills of lading, they not being then aware that they had been indorsed by *Le Cointe & Co.* to the defendants. The case of *Cock v. Taylor (a)*, is an authority in point. There, the master of a ship having, by the bill of lading, contracted with the shippers to deliver the cargo to certain persons, or their assigns, *he or they paying freight for the same*—it was held that the demanding and taking of such goods from the master by a purchaser and assignee of the bill of lading, the freight not having been paid, was evidence of a new contract and promise on the part of such purchaser, as the ultimate appointee of the shipper for the purpose of delivery, to pay the freight; and that he was liable for the amount in an action of *indebitatus assumpsit* brought against him by the ship-owner. Lord *Ellenborough* there said: "It appears to me, that, though there were no original privity of contract between these parties for payment of the freight, yet the tak-

(a) 13 East, 399.

ing of the goods from the ship by the purchaser under the bill of lading, is evidence of a new agreement by him, as the ultimate appointee of the shippers for the purpose of delivery, to pay the freight due for the carriage of such goods, the delivery of which was only stipulated with the shippers to be made to the consignees named in the bill, or their assigns, *he or they paying freight for the said goods.*" And Mr. Justice *Le Blanc* said: "The purchaser must have understood at the time, that the goods were liable to be detained for the payment of the freight, if it were not paid before delivery; and his receiving them from the master, and the master's parting with his lien, and giving them up to the purchaser at his request, is evidence of a new contract between them, that the purchaser would pay the freight." By the act for regulating the *West India Docks* (a), goods in the Docks are to be considered in the same situation with respect to freight, as goods on board ship. The mere act of taking off the stop which had previously been placed on the goods, only amounted to an assent on the part of the plaintiff, that they should be delivered according to the terms of the bills of lading. The case of *Cock v. Taylor* was confirmed by that of *Bell v. Kymer* (b). In the latter case, it was held that the indorsee of a bill of lading which directed goods to be delivered *to order, or to assigns, paying freight*, was liable for the freight, though he was only acting as broker for the consignee, and though twelve months had elapsed since the landing of the goods, without any demand for freight, he being bound not to deliver the goods till he knew that the freight had been paid.

The Court called on—

Mr. Serjeant *Taddy*, for the defendants.—Freight can only be demanded by virtue of a contract. The liability

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(a) 39 Geo. 3, c. lxix

(b) 1 Marsh. 146; S. C. 5 Taunt, 477.

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thus created cannot be transferred from one to another. The ship-owner contracts with the shipper for payment of freight, and may detain the cargo until payment. In some cases, the owner being without remedy against the original contractor, it has been holden that the party receiving the goods is liable. *Cock v. Taylor* was decided on that ground. That case came under the consideration of the Court in *Wilson v. Kymer* (a), which is similar to the present, and the Court said that they would not go beyond that case. In *Wilson v. Kymer*, the consignees of a *West India* cargo, deliverable by bill of lading to them or their assigns, he or they paying freight for the same, indorsed it to the defendants, their brokers, for advances made by them. On its arrival, the cargo was landed at the *West India* Docks, in the names of the consignees, but was entered by the defendants at the Custom-House, in their own names. The defendants afterwards obtained delivery from the *West India* Docks under an order from the consignees, and not under the bill of lading. It was at first held, that the receipt of the cargo by the defendants, under the order of the consignees, was not a sufficient ground to raise an implied *assumpsit* on their part to pay the freight: but, as it afterwards appeared, from the previous dealings between the parties, that the defendants had been in the habit of receiving goods in the same manner, and paying the freight for them, it was considered sufficient to raise such an implied *assumpsit*. In *Cock v. Taylor*, the defendant received the goods as a purchaser of the bill of lading. Here, the defendants did not receive the goods under the bills of lading; they received them as the agents of *Le Cointe & Co.*, by virtue of the order of Messrs. *Robinson & Co.* In *Moórsom v. Kymer* (b), a ship was chartered on a voyage out and home, for a specified time, at a certain rate of payment on

(a) 1 Mau. & Selw. 157.

(b) 2 Mau. & Selw. 303.

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the homeward cargo, in full for the hire of the ship for the time, to be paid, in part by an advance on the ship's clearing for the outward voyage, and the rest, on her return, by bills payable at a future day. On loading the homeward cargo, a bill of lading was signed, to deliver the goods to the charterers, or their assigns, he or they paying freight for the said goods, as *per* charter-party—it was held, that the indorsees of the bill of lading, for valuable consideration, were not liable to the ship-owner, upon an implied *assumpsit* to pay the freight arising out of the receipt of the goods under the bill of lading. The liability of the consignee of a bill of lading rests on the custom of trade, *Roberts v. Holt* (a), and is confined to the original contracting parties. Here, the parties liable were *Le Cointe & Co.*, and the application was first made to them. Had they been sued, they could not have defended the action on the ground of their having handed over the bills of lading to the present defendants, who were mere brokers. Besides, the declaration is not framed with reference to a special contract; and, as the contract, if any, was a special engagement to pay the freight by a bill at ninety days' sight, the general count on an *indebitatus assumpsit* is insufficient.

Lord Chief Justice BEST.—The justice of the case is clearly with the plaintiff, and our judgment will not be inconsistent with any of the previous decisions. The facts of the case are shortly these: The plaintiff, a ship-owner, brought goods from the *West Indies* to this country, on freight; by the bills of lading, the goods were made deliverable to the consignees, or their assigns, he or they paying freight for the same, and the defendants acted as the brokers of the consignees. On the part of the defendants, it has been contended, that the original contract for the payment of freight was made with *Le Cointe & Co.*, the

(a) 2 Show. 443.

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consignees, and that the defendants, particularly as they were only the brokers or agents of *Le Cointe & Co.*, could not be charged by the mere assignment of the bills of lading to them. The bills of lading are not the foundation of the contract for payment of freight, they are only receipts for the goods, which the master of the vessel thereby undertakes to deliver to the legal holders, or assigns, on their paying the freight due; and he has a *lien* on the goods for such freight. The act for the regulation of the *West India Docks* (a) places goods landed or warehoused there, in the same situation, with regard to the claims of the ship-owner for freight, as if the goods had remained on board the vessel. A party receiving a bill of lading, knowing that the freight remains unpaid, receives it under an implied contract that he will pay the freight. The defendants here received the goods by virtue of the bills of lading, with notice that the freight had not been paid. They were fully apprised of the terms of the bills of lading, and knew the amount of freight due. Their being brokers, and having advanced money on the goods, makes no difference. They should not have advanced to *Le Cointe & Co.* more than the value of the goods, subject to freight. It is, in fact, imposing no hardship on the defendants to say that they are liable for the freight; but it would be an extreme hardship on the plaintiff, were we to hold that he was not entitled to recover it from the parties who obtained the goods under the bills of lading. The case of *Cock v. Taylor* appears to me to be decisive. It has been attempted to distinguish that case from the present, because there the defendant was the purchaser of the bill of lading. In *Bell v. Kymer*, the defendants were merely brokers, and Lord Chief Justice *Gibbs* said (b): "The holders of a bill of lading are bound to know that they are liable for the freight." As to the application for payment of the freight, which was made on the part of the

(a) 4 Geo. 4, c. 24, s. 83.

(b) 1 Marsh. 149.

plaintiff to *Le Cointe & Co.*, no argument arises out of that, to favour the defendants; for the plaintiff was not then aware that the bills of lading had been indorsed by *Le Cointe & Co.*, and therefore acted in ignorance. *Wilson v. Kymer* is distinguishable from the present case, inasmuch, as there the defendants did not obtain the goods under the bill of lading, but under an order from the consignees; and Lord *Ellenborough* said (a): "There is certainly one circumstance in this case which forms a material distinction between this and the case of *Cock v. Taylor*, and which seems to influence the judgment of my brethren; and, therefore, I wish the case to go to a new trial, in order to inquire into the fact on which that distinction is founded; and then, if it should be deemed necessary, to consider further of that distinction. The circumstance is this, that, in *Cock v. Taylor*, the goods were delivered under the bill of lading only; here, they were delivered to the defendants, who were entitled to have them under the bill of lading, and might have enforced their delivery under it, and from whom they might have been withheld until the freight was satisfied: but it is said, they obtained possession of them under an order for delivery from the consignees, which imports that the consignees still continued the proprietors, and not under the bill of lading, although they were indorsees of the bill of lading at the time. Then, the question is, can the law extend the lien as against persons who do not claim in that character under which they would be liable for freight, *vis.* as indorsees of the bill of lading, but as the agents of the consignees, so as to make the parting with the lien to them a ground of consideration for an implied *assumpsit* by them to pay the freight? That would be carrying the law one step further than was done in *Cock v. Taylor*; and, in a case of lien, we should be anxious to tread cautiously, and on sure grounds, before we extend it beyond the limits of

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(a) 1 Mau. & Selw. 164.

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decided cases." And Mr. Justice *Bayley* said (a): "I think *Cock v. Taylor* was rightly decided. In that case, the defendant received the goods as a purchaser of the bill of lading, making that his title to them, and virtually consenting that his name should be pledged to the owner for the freight; but, here, it seems to me, the defendants never did consent to that; but, standing in a situation in which the owners might have had their names pledged if they had claimed under the bill of lading, they adopted the alternative in which their names were not to be pledged to the owners." In *Moorsom v. Kymer*, the special contract created by the charter-party repelled the inference of an implied contract; and Mr. Justice *Le Blanc* there said (b): "The late decision of *Cock v. Taylor* has been pressed upon us, but it does not appear that any charter-party existed in that case; the defendant claimed the goods under the bill of lading, but it did not appear that the party under whom he claimed was liable in any way whatever; so that, there, if the defendant was not liable, it did not appear that the owner of the ship could have resorted to any other person. Therefore, taking that to be an authority, that, where the ship is a general ship, and there is no other to whom the party can have resort, the law will imply a promise, in order to prevent a failure of justice." So, here, to prevent such failure, we must imply a promise. With respect to the form of the pleadings—on the authority of *Cock v. Taylor*, where the declaration contained only the common *indebitatus* count for freight, as here, I am of opinion that, the contract being executed, it was not necessary to declare specially.

Mr. Justice PARK.—Every argument that has been urged on the part of the defendants in this case, has been before urged in vain. It has been supposed that *Wilson v. Kymer* is at variance with *Cock v. Taylor*; but the circumstances were different. Mr. Justice *Bayley*, in

(a) 1 Mau. & Selw. 166.

(b) 2 Mau. & Selw. 316.

Moorson v. Kymer, said (a), that *Wilson v. Kymer* was decided entirely on the usage of trade. *Cock v. Taylor* has never been questioned. Unless we overturn it, as well as *Bell v. Kymer*, our judgment must be for the plaintiff. *Bell v. Kymer* was decided by that very eminent commercial lawyer, Lord Chief Justice Gibbs.

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Mr. Justice BURROUGH.—Had I been a Judge of the Court of *King's Bench* at the time *Cock v. Taylor* was decided, I should have said that a general *indebitatus assumpsit* would not lie. I think it of the very essence of the law to adhere to strict forms; I cannot think them unimportant. The form of the bill of lading is intended for the security of the ship-owner, who is not bound to part with the goods until the freight is paid; but, if he entrusts a party with them, that will raise a sufficient implied contract: and in such a case, the contract should be declared on specially. The general *indebitatus assumpsit* as on an executed consideration can only lie as between the original parties. Here, the defendants are not connected in any way with the original contract, except by the indorsement of the bills of lading, which is no transfer of the liability of the first contractors. If this point had been new, I should have been of opinion that the action was not maintainable upon this general form of declaring; but, as the matter has already been decided in *Cock v. Taylor*, which has not been over-ruled, I feel myself bound to abide by that decision.

Mr. Justice GASELEE.—We are not called upon for the first time to decide whether or not it be necessary to declare specially in a case of this sort. The authority of *Cock v. Taylor* has never been called in question. I therefore concur with the rest of the Court in thinking that we must be governed by it in this instance.

Judgment for the plaintiff.

(a) 2 Mau. & Selw. 320.

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Friday,
Feb. 3rd.

A testator devised lands to his wife, for life, remainder to his sons, in fee, "subject to, and charged and chargeable with, the payment of the yearly rent or sum of 20*l.* to the defendant and her assigns, during her life:—*Held*, a charge on the land, and that the defendant might distrain for arrears.

BUTTERY *v.* MARY ROBINSON.

THIS was an action of replevin. The defendant avowed—That one *Matthew Robinson* was seised in his demesne as of fee of the premises in which &c., and that he duly made his will, by which he gave and devised them to his wife, *Jane Robinson*, for life, remainder to the testator's sons, in fee, "but subject, nevertheless, to, and charged and chargeable with, the payment of the yearly rent or sum of 20*l.* sterling then and there devised and given by the said *Matthew Robinson* to the defendant *Mary Robinson* and her assigns, during the term of her natural life, to be paid by his, the testator's, said wife, so long as she should live, and, after her decease, to be paid by his said sons, equally between them, by four equal quarterly payments, the first payment thereof to begin and be made at the end of three calendar months next after his, the said testator's, decease."

There was a second avowry, in which it was alleged, that *Matthew Robinson*, the testator, devised two-thirds of the premises in question to his wife, for life, remainder to his sons, in fee, subject to the same charge; and that two years' rent were in arrear.

The plaintiff pleaded in bar—"That the said *Matthew Robinson* did not give, in or by his said will, any power or right of distress, nor is any clause or power of distress therein contained, to enable the defendant to levy any arrears of the said yearly rent or sum so given and bequeathed to her by the said will, as aforesaid, in case such yearly rent or sum should at any time be in arrear."

To this plea, the defendant demurred generally; and the plaintiff joined in demurrer.

The case now came on for argument, when—

Mr. Serjeant *Spankie* being about to argue in support of the demurrer, the Court called on—

Mr. Serjeant *Peake* to support the plea.—By the common law, a distress for rent in arrear could only be supported in the cases of a rent-service, or a rent-charge, where a power of distress was given by the grant creating such rent; and without such a special reservation, no distress could be made for a rent-charge. This is not the case of a rent-seck, which might have been distrained for under the 5th section of the statute 4 *Geo. 2*, c. 28 (a). It is a mere personal charge on the party in possession of the land, for the payment of the annuity, so long as he continues to occupy. Although, in case of default of payment, equity might relieve the annuitant, still, under the terms of the will, the rent cannot be distrained for. In *Bradbury v. Wright* (b), it was held, that a distress was not incident to a fee-farm rent, as such, except the case were brought within the 5th section of the statute 4 *Geo. 2*, c. 28.

Lord Chief Justice BEST.—The annuity or rent in this case bequeathed by the testator's will, is a direct charge upon the land, and not a mere personal charge on the occupier. The premises are expressly devised "subject to, and charged and chargeable with, the payment of the yearly rent or sum of 20*l.* to the defendant and her assigns, during the term of her natural life."

The rest of the Court concurring—

Judgment for the avowant.

(a) Which—after reciting that the remedy for recovering rents-seck, rents of assize, and chief rents, are tedious and difficult—enacts, "that all and every person or persons, bodies politic and corporate, shall and may have the like remedy by distress, and by impounding and selling the same, in cases of rent-seck, rents of as-

size, and chief rents, which have been duly answered or paid for the space of three years, within the space of twenty years before the first day of the then session of Parliament, or shall be thereafter created, as in case of rent reserved upon lease; any law or usage to the contrary, notwithstanding."

(b) 2 Doug. 624.

1826.

BUTTERY
v.
ROBINSON.

1826.

Monday,
Feb. 6th.

SMITH v. FLOWER.

The plaintiff prescribed for a right of sole pasture "from the feast of *St. Thomas* until the 18th *April*, in every year:"—*Held*, that, the right claimed being a prescriptive right, its commencement and conclusion must have reference to *St. Thomas's* day, old stile; and that the description of "the feast of *St. Thomas*" generally, was sufficient.

THIS was an action of replevin for taking the plaintiff's cattle. The defendant, in his avowry, alleged, that he was lawfully possessed of a certain close of pasture land called *Prior's Wood* close; and that, because the plaintiff's cattle were wrongfully depasturing there, he took them as for and in the name of a distress for the damage so done and doing.

The plaintiff, by his pleas in bar, prescribed for the right of sole feeding and depasturing his cattle in the said close in which &c., from the feast day of *St. Thomas* until the 18th of *April*, yearly and every year.

At the trial, before Mr. Justice *Gaselee*, at the last *Summer* Assizes for the county of *Somerset*, several deeds were produced on the part of the plaintiff (one of the year 1763), wherein the right claimed was described as commencing on *St. Thomas's* day and ending on the 18th *April*. Several witnesses were called for the purpose of proving the mode in which this right had for a number of years been exercised by the plaintiff; but the evidence as to the precise time of his turning in cattle was somewhat conflicting.

The learned Judge directed a nonsuit, the right being laid in the pleadings as commencing from *St. Thomas's* day generally, and that proved being an immemorial right, and consequently having relation to *St. Thomas's* day, old stile. Leave was, however, reserved to the plaintiff to move to set aside the nonsuit, and enter a verdict, if the Court should think the description sufficient.

Mr. Serjeant *Taddy*, accordingly, in the course of the last Term, obtained a rule *nisi*. He submitted, that the alteration of the calendar by the statute (a) could not

(a) 24 *Geo.* 2, c. 23, s. 3, which fixed feast days, holy-days, and enacts, "that all and every the fast days, which are now kept and

have the effect of altering the descriptions of the several feast days; and that, from the nature of the right claimed, and of the documentary evidence offered in support of it, the day referred to must necessarily mean *St Thomas's day*, old stile: and he cited the cases of *Doe d. Hall v. Benson* (a), where, on a parol demise, to commence from *Lady-Day*, evidence of the custom of the country was held to be admissible, to shew that, by *Lady-Day*, the parties meant old *Lady-Day*; and *Doe d. Hinde v. Vince* (b), where it was held, that, if a tenant from year to year hold from old *Michaelmas*, a notice to quit at *Michaelmas* generally, is good, Lord Chief Baron *Macdonald* saying, that evidence was receivable to shew in what sense the word *Michaelmas* was used between the parties.

Mr. Serjeant *Wilde* now shewed cause.—The feast day of *St. Thomas* mentioned in the pleas must necessarily be taken to mean that which is now understood as *St. Thomas's day*, viz. the day fixed by the statute, not that which formerly was *St. Thomas's day*; and, as the right claimed by the plaintiff is an antient immemorial right, the evidence of course applied to *St. Thomas's day*, old stile; thus, there was a fatal variance between the right prescribed for and that proved. The nonsuit, therefore, must stand; for, if the verdict were entered for the plaintiff, the record in this case would be evidence of the existence of a right of pasture from the 21st of *December*,

observed by the church of *England*; and also the several solemn days of thanksgiving, and of fasting and humiliation, which, by virtue of any act of Parliament now in being, are, from time to time, to be kept and observed, shall be kept and observed on the respective days marked for the celebration of the same in the

new calendar, that is to say, on the same respective nominal days on which the same are now kept and observed, but which, according to the alteration by this act intended to be made, will happen eleven days sooner than the same now do."

(a) 4 Barn. & Ald. 588.

(b) 2 Campb. 256.

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which would be totally inconsistent with the prescriptive right evidenced by the deeds, which was eleven days earlier. In *Hockin v. Cooke* (a) it was held, that a contract to sell corn at a certain price *per bushel*, must be taken to mean the *Winchester* (then the statutable bushel (b),) and would not be supported by evidence of an agreement to sell by some other measure. In *Doe d. Spicer v. Lea* (c), it was decided, that a lease of lands, by deed, since the new stile, to hold from the feast of *St. Michael*, must be taken to mean from new *Michaelmas*, and cannot, by extrinsic evidence, be shewn to refer to a holding from old *Michaelmas*. In *Doe d. Hinde v. Vince*, the meaning of the notice was ascertained by the commencement of the tenancy. On principle, therefore, and on authority, the nonsuit in this case is correct.

Mr. Serjeant *Taddy*, in support of his rule.—The description of the feast day of *St. Thomas* generally on the record, is sufficiently supported by the evidence. The day must be taken with reference to the prescriptive right claimed, by which clearly the old stile was intended. There was no necessity for stating on the record the statutory alteration in the almanack; the Court must take judicial notice of it. By an express contract, parties may bind themselves either according to the old or the new computation of time; and evidence may be given of the intent of the parties. Here, the intent is clearly manifested by the documentary evidence on which the plaintiff's claim chiefly rested; he is, therefore, entitled to have a verdict entered for him.

Lord Chief Justice BEST.—The plaintiff in this case claims a right of sole feeding and depasturing his cattle on a certain close, from the feast day of *St. Thomas* until

(a) 4 Term Rep. 314.

(b) But see the statute 5 Geo. 4, c. 74.

(c) 11 East, 312.

the 18th of *April*, in every year. This right he claims by virtue of a prescription, which supposes an antient grant. A prescriptive right, therefore, having reference to an antient grant, necessarily implies the old division of time. In a deed made subsequently to the passing of the statute 24 *Geo. 2*, the new stile undoubtedly must be understood; but deeds made before that statute must refer to the old stile. In *Doe d. Spicer v. Lea*, the Court of *King's Bench* was of opinion that no extrinsic evidence could be given to explain the time of holding stated in the deed, which must be taken to be from *new Michaelmas*, since the act for altering the stile, unless there had been any reference in the deed itself to a prior holding. In this case, the prescription implies an immemorial right, which of course had existence before the statute. The difficulty as to the 18th of *April* may be solved in the same manner. This will not in any degree affect the rights of the parties; for, by the *fifth* section of the statute (a) it is provided, that the act shall not have the

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(a) Which, after reciting, "that, according to divers customs, prescriptions and usages, in certain places within this kingdom, certain lands and grounds are, on particular nominal days and times in the year, to be opened for common of pasture and other purposes; and, at other times, the owners and occupiers of such lands and grounds have a right to inclose or shut up the same, for their own private use; and there is, in many other instances, a temporary and distinct property and right vested in different persons, in and to many such lands and grounds, according to certain nominal days and times in the year; and that the anticipating or bring-

ing forward the said nominal days and times by the space of *eleven* days, according to the said new method of supputation, might be attended with many inconveniences"—enacts—"That nothing in this act shall extend, or be construed to extend, to accelerate or anticipate the days or times for the opening, inclosing, or shutting up any such lands or grounds as aforesaid, or the days or times on which any such temporary or distinct property or right in or to any such lands or grounds as aforesaid is to commence; but that all such lands and grounds as aforesaid shall, from and after the passing of this act, be from time to time respectively opened, inclosed, or

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effect of accelerating or anticipating the days or times for the opening, inclosing, or shutting up common lands or grounds. I am, therefore, of opinion that the plaintiff's right is well described on this record, and, consequently, that the rule for setting aside the nonsuit, and entering a verdict, must be made absolute.

Mr. Justice PARK.—It is impossible, consistently with common sense, to come to a conclusion different from that of my Lord Chief Justice. I perfectly agree with the Court of *King's Bench* in *Doe d. Spicer v. Lea*, that no extrinsic evidence can be given to explain the time of holding under a deed, and that such holding must have reference to the new stile, unless the deed clearly refers to another deed having existence before the alteration by statute. But here, the supposed deed which is the foundation of the prescription, can only refer to the old stile.

Mr. Justice BURROUGH.—The prescriptive right which the plaintiff claims is from *St. Thomas's* day, as it existed before the statute. It is an immemorial right founded upon a supposed antient grant, and therefore must necessarily refer to the antient division of time. Allegations of this nature must be taken according to their legal effect. There will be no alteration in the substantial rights of the parties.

Mr. Justice GASELEE.—The greatest difficulty arises as to the 18th of *April*; for the old stile would of course

shut up; and such temporary and distinct property and right in and to such lands and grounds as aforesaid, shall commence and begin upon the same natural days and times on which the same should have been so respectively

opened, inclosed, or shut up, or would have commenced or begun, in case this act had not been made, that is to say, eleven days later than the same would have happened, according to the said new account and supputation of time."

equally regulate both the commencement and conclusion of the time of depasturing. Still, however, it is no objection that a prescriptive right is pleaded in too limited a manner. Upon the whole, therefore, the safer course will be to hold the allegation sufficient.

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Rule absolute.

WYNDOWE v. The Bishop of CARLISLE, and FLETCHER.

Tuesday,
Feb. 7th.

THIS was a *Quare Impedit*. In the last Term, the defendant obtained judgment as in case of a nonsuit. The Prothonotary refused to tax his costs, being of opinion that none were allowable in *Quare Impedit*.

In *Quare Impedit*, a defendant is not entitled to costs on a judgment as in case of a nonsuit.

Mr. Serjeant Cross moved for a rule *nisi* to direct the Prothonotary to tax the defendant his costs.—By the statute 4 Jac. 1, c. 3, defendants are entitled to costs on a nonsuit, in all actions wherein the plaintiff or defendant might have costs, in case judgment should be given for him; and by the 14 Geo. 2, c. 17, costs are given to the defendant upon a judgment as in case of a nonsuit, in all cases where he would, upon nonsuit, be entitled to the same. Damages were first given to a plaintiff in *Quare Impedit* by the statute of Westminster 2 (a). In *Pilfold's* case (b) it is said, that, where damages are newly given by a statute subsequent to the statute of Gloucester (c), where no damages were formerly recoverable, the plaintiff can only recover the damages thereby given, and no costs, unless costs were expressly superadded by such new statute. But, in commenting on the statute of Gloucester, Lord Coke says (d): “This clause of the statute doth extend to give costs,

(a) 13 Edw. 1, c. 5, s. 3.

(b) 10 Rep. 116 a.

(c) 6 Edw. 1, c. 1.

(d) 2 Inst. 289.

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where damages are given to any demandant or plaintiff in any action, by any statute made *after* that Parliament;" and in *Jackson v. The Inhabitants of Calesworth* (a), Mr. Justice *Buller*, speaking of this passage, says: "Lord *Coke*, in his *Second Institute*, lays down a rule different from that in *Pilfold's* case." In *Hullock on Costs* (b), it is said: "Costs were recoverable in a *Quare Impedit*, at the common law; and the reason why they are not still so in the cases where damages are given by the statute of *Westminster 2*, is, the great amount of those damages: but both this law and reasoning seem incorrect. It has been shewn, that, at the common law, a plaintiff recovered costs in no one instance; and, as *no damages* could be recovered in a *Quare Impedit* before the statute of *Westminster 2*, *no costs* could be recovered in any such case under the statute of *Gloucester*; and, on the other hand, if *some* damages might have been obtained in a *Quare Impedit* before the statute of *Westminster 2*, that act would have been *accumulative*, increasing the damages where some were before recoverable; and then, however large or exorbitant those damages might be, it is clear that costs would have followed a recovery." The rule laid down in *Pilfold's* case has been considerably narrowed by subsequent decisions. In *Cresswell v. Hoghton* (c), it was held, that a party grieved, who recovers damages against the sheriff for not taking bail under the statute 23 *Hen. 6*, c. 9, is also entitled to costs. In *Tyte v. Glode* (d), it was decided, that costs are due to a plaintiff who recovers treble damages in an action against the sheriff, on the 29 *Eliz.* c. 4, for taking more than the fee allowed by that statute, on levying the plaintiff's goods under an execution. In *Witham v. Hill*, Lord Chief Justice *Willes* said (e), that he consider-

(a) 1 Term Rep. 72.

(b) 2nd Edit. p. 5.

(c) 6 Term Rep. 355.

(d) 7 Term Rep. 267.

(e) 2 Wils. 92.

ed *Pilfold's* case as a very extraordinary one, although he would not over-rule it, as he thought the case before him distinguishable from it. In the Mayor of *Plymouth* v. *Werring* (a), it was held, that, where a penalty is given by a statute (even subsequent to the statute of *Gloucester*) to the party grieved, he is entitled to costs if he succeed; and, if he be nonsuited, or a verdict pass against him, he is liable to pay costs to the defendant, either under the 23 *Hen.* 8, c. 15, or 4 *Jac.* 1, c. 3, which latter statute gives costs to the defendant in all cases where the plaintiff is entitled to costs if he succeed. Although it was held in *Thrale* v. The Bishop of *London* (b), that a defendant is not entitled to costs on a judgment on demurrer in *Quare Impedit*, yet that decision turned on the statute 8 & 9 *Wm.* 3, c. 11; and *Jackson* v. The Inhabitants of *Calesworth* was not there adverted to. In *Ward* v. *Snell*, Lord Loughborough said (c), that "the statute of *Gloucester* is a remedial act, and ought to have a favourable interpretation." The defendant in this case is, therefore, clearly entitled to costs.

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Lord Chief Justice BEST.—This question was decided, after very great consideration, in *Pilfold's* case, and in *Thrale* v. The Bishop of *London*. In the former of those cases, it was expressly held, that, where damages are newly given by a statute passed subsequently to the statute of *Gloucester*, the plaintiff cannot recover costs; and in the latter, that a defendant is not entitled to costs on a judgment on demurrer in *Quare Impedit*. Where no damages are given, there can be no claim for costs: and in *Quare Impedit*, the plaintiff recovers no damages, but only a penalty of two years' value of the living. In the cases referred to damages were given; and the statute of *Gloucester* only operates to give costs in those cases where a

(a) Willes, 440.

(b) 1 H. Blac. 530.

(c) Id. 13.

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plaintiff was entitled to damages. It is not necessary to decide in this case, whether the statute of *Gloucester* extends to cases wherein damages are given by subsequent statutes, for no statute has given damages in *Quare Impedit*.

The rest of the Court concurring—

Rule refused.

Friday,
Feb. 3rd.

ANGELL, Demandant; ANGELL, Tenant.

In a writ of right, the Sheriff returned to the precept for summoning four knights to choose the grand assize, that he had caused to be summoned, *E. P. Esq., D. S. Esq., S. H. Esq., and T. A. Esq.*, four lawful knights of his county:—*Held*, that this return was not traversable.

THIS was a writ of right for the recovery of certain property, consisting of three fourths of a piece of land situate in the parish of *Kilnsea*, in the county of *York*, near the *Spurn-Point* of the river *Humber*; and also three fourths of certain light-houses erected thereon. The Sheriff returned to the precept for summoning the knights to choose the grand assize, as follows:—

“ By virtue of this writ, to me directed, I have caused *Edward Place, Esq., Doyley Saunders, Esq., Samuel Herbert, Esq., and Thomas Appleby, Esq.*, four lawful knights of my county, girt with swords, to be summoned by *W. E.*, and *J. S.*, my bailiffs, to be before his Majesty's Justices at the day and place within mentioned, to do as by this writ they are required, and as I am commanded. The said summoners are and each of them is mainprized by *John Doe* and *Richard Roe*.

The answer of

J. H. Esq., Sheriff.”

The gentlemen named in the writ, appeared in Court, and were about to be called by the Secondary, when—

Mr. Serjeant *Vaughan*, for the tenant, objected that he had had no notice of executing the writ; and cited the case

of *Adams*, demandant; *Radway*, tenant (*a*); which he submitted was in point to shew that the tenant was entitled to notice.

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The Court over-ruled the objection, as there was a day in Court mentioned on the record.

Mr. Serjeant *Vaughan* then challenged the gentlemen returned, on the ground that they were not lawful knights, but esquires only. He submitted, that, whatever doubts might formerly have existed as to the tenant's right to challenge the knights, those doubts were removed by the case of *Lord Winsor v. St. John (b)*, where Sir *G. Paolet*, one of the knights, was challenged *in banc*, on his appearing to the summons with the other three knights to choose the grand assize.

Mr. Serjeant *Spankie* submitted that the Sheriff's return, that he had caused to be summoned four lawful knights, was conclusive; and that, at all events, if the tenant averred that the gentlemen summoned were not knights, the demandant should have an opportunity of taking issue upon that fact.

Lord Chief Justice BEST.—According to the case of *Rex v. Edmonds (c)*, the challenge must be entered on the record. Let it, therefore, be entered in the proper form, and let the gentlemen with swords appear in Court at eleven o'clock to-morrow morning; the entry being considered as having been made on this day.

The challenge was accordingly entered on the record, and the four gentlemen returned as knights, girt with swords, as before, again appeared in Court.

Saturday,
Feb. 4th.

(a) 1 Marsh. 602.

(b) Dyer, 103 b.

(c) 4 Barn. & Ald. 471.

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Mr. Serjeant *Bosanquet* and Mr. Serjeant *Spankie*, for the demandant, demurred to the challenge.—The Sheriff's return is not traversable on the ground alleged. In a case in *Brooke's Abridgment* (a), the parties joined the *mise*, and process was issued to the Sheriff, commanding him to cause to come four knights to choose the grand assize, and he returned two knights and two serjeants, and that there were no more knights in the same county, who were not of the affinity of the one party or the other. Mr. Justice *Thorp* said: "The return is not sufficient, for the parties may challenge if it be so;" but afterwards they were admitted *ex assensu partium*, &c. *Brooke* says—"But it seems, if the Sheriff returns gentlemen, and calls them knights, this is sufficient, and not traversable, whether they are knights or no; for, the attaint is *viginti quatuor milites*, and yet they return gentlemen; and after, they choose *sixteen* knights of themselves, *gladiis cinctos*, according to the form of the writ; and, for want of knights, they may choose others: and so it seems of the return of the four; and so it was said *per Thorp*, that, if he returns two knights and two others, where there are no more knights in the county, this suffices: and so that the grand Jury shall be always more than twelve, as it seems; and, if the parties will challenge they may, and if they challenge any of the four knights, this shall be tried by the other twelve knights;" and "afterwards they went aside and chose a Jury, and certified it to the Court, and the parties assented to it:" 39 *Edw. 3*, 2, is referred to as an authority. So, in the case of the election of knights of the shire, the Sheriff is required to return "*legales milites comitatus*;" yet the persons returned are seldom knights; it suffices if they possess land amounting to a knight's fee (b).

(a) Tit. "*Droit de Recto*," p. 263 b, pl. 18.

(b) This, by the statute *de mili-*

tibus (1 *Edw. 2*, stat. 1), was 20*l.* a-year, and was enforced against all who possessed 40*l.* a-year, un-

Lord *Coke* says (a), that, when the four knights appear, they cannot be challenged; for that they are, in law, Judges for the purpose of electing the grand assize, and Judges or Justices cannot be challenged.

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Mr. Serjeant *Vaughan*, and Mr. Serjeant *Taddy*, for the tenant.—If the Sheriff's return were not traversable, he might return paupers for knights, and still that return could not be contended against. So, he might return upon a common Jury, one who had lost his *liberam legem*, or one of kin to one of the parties. In Lord *Winsor v. St. John*, one of the knights was challenged, because he had married the demandant's daughter. A similar objection might, for ought that appears to the contrary, exist in the present instance. The qualification of a knight's fee ceased to exist when the military tenures were abolished by the statute 12 Car. 2, c. 24.

Lord Chief Justice BEST.—Although Lord *Coke* says “that the four knights electors of the grand assize are not to be challenged, for that, in law, they are Judges to that purpose, and Judges or Justices cannot be challenged;” still I am of opinion that the knights may be challenged, and that the reason given by his Lordship is inconclusive. In the *Year Book* (b), it is said, that “the four knights may be challenged, when they and the parties are choosing the recognitors; and that, if one be challenged, it is to be tried by the other three, and, if two be challenged, by the other two, and if three be challenged, a new writ must issue to choose four other knights; for, no challenge can be tried by less than two.” In Lord *Winsor v. St. John* (c), one of the knights was challenged *in banc*. In *Squire v.*

til the passing of the statute of Charles.

(a) Co. Litt. 294 a.

(b) 15 Edw. 4, l.

(c) Dyer, 103 b, pl. 8.

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Read (a), it is said that the challenge must be made upon the appearance of the knights, and before they are sworn. These authorities shew, that, if the challenge be tendered in time, the knights may be challenged on substantial grounds. In *The King v. Edmonds*, Lord Chief Justice *Abbott* said (*b*): "On a writ of right, whereon the Sheriff returns to the Court four knights, by whom, after being sworn for this purpose, twelve others are chosen and named in the presence of the parties, to constitute, with the same knights, the grand assize, or trying Jury, consisting of sixteen persons, there cannot, *after* the panel is returned by the four, be any challenge, either of the panel or of the polls, though the twelve, before any assent or return of the panel, may be challenged before the four knights electors (*c*)."
On the ground now urged, however, I am clearly of opinion that the return is not traversable. There is no analogy between a grand assize and a common Jury. As to the latter, it is sufficient for the Sheriff to return them as good men, without setting forth their qualification. It is only in the case of a writ of right that the description of the Jurors is requisite. The writ which commands the Sheriff to return the knights of the shire, directs him to return *milites gladiis cinctos*. Knights are seldom in fact returned; *notabiles armigeri* may be elected. No objection has ever been made, nor would any now be entertained, as to this mode of returning members to the House of Commons. In the present Parliament, there is not one knight sitting for any county. It has been said in the argument, that, if the Sheriff's return be held not traversable, he may return, as knights, persons who are paupers, or persons related to one of the parties. That argument is perfectly groundless. If the Sheriff, in such a case

(a) Moore, 67, pl. 181.

Actions, 97, 102; 7 Hen. 4, fo.

(b) 4 Barn. & Ald. 480.

20; Co. Litt. 294.

(c) Referring to *Booth*, On Real

as this, where he is bound to know the rank and eligibility of the Jurors, make an improper return of a pauper, or of one of affinity to one of the parties to the suit, we would allow it to be pleaded; for, that would raise a material question: a material fact may always be traversed, though a traverse is not allowed in an unimportant matter. Formerly, when every person who possessed a knight's fee was forced to take the honour of knighthood, it was necessary, in order to secure the return of competent persons on the trial of a writ of right, that none should be returned but those who were actually knights; all those who formed the grand assize were then required to be knights. Persons possessing a knight's fee were called *chevaliers* (a); yet, unless they were actually knighted, they were not eligible to serve on a grand assize. This degrading system of knighting men of small estate was abolished by the statute 21 Car. 2, c. 24 (b). The state of society is now so different from what it was in those days, that it would be difficult, or perhaps impracticable, to find, in any county, knights enough to form a grand assize; and, even if it were not so, I believe few would prefer a grand assize composed of knights, to one of gentlemen. I, therefore, think that the return in the present instance may, on the authorities, and on reason, safely be held conclusive.

Mr. Justice PARK.—I quite agree in opinion with my Lord Chief Justice. By analogy, the return of the Sheriff is conclusive. It can only be impeached by action. If the Sheriff collusively make a false or improper return, he is liable to an action.

(a) Selden, Titles of Honor, 707. (equivalent to Knight's-service in England), was abolished in Scotland.

(b) By the statute 20 Geo. 2, c. 50, the tenure of *Ward-holding*

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Mr. Justice BURROUGH.—I think my Lord Chief Justice has put the case upon the true grounds. There are no modern authorities on this point, but I think the older ones are conclusive to shew that the return of the Sheriff cannot be questioned.

Mr. Justice GASELEE.—It is not necessary now to inquire whether the knights may or may not be challenged; but it seems surprising, that, after the 39 *Edw.* 3, Lord *Coke* should say, that they may not be challenged. I think they clearly may be challenged for certain causes. The question, however, in this case, is, whether or not the return of the Sheriff is conclusive. It is every day's practice for the Courts to act upon the Sheriff's return, although it may be false, and he afterwards punished for it. So, here, I think, with the rest of the Court, that the tenant is estopped by the return.

The gentlemen returned as knights were sworn, and retired for the purpose of electing the grand assize; they afterwards returned into Court, when, the Secondary having read the list of recognitors chosen, the cause was—

Adjourned to one month of *Easter*.

The Court will not accede to an application for a trial at bar, unless the specific difficulties of the case are pointed out to them at the time.

Mr. Serjeant Vaughan then obtained a rule *nisi* for a trial at bar in this cause. The motion was founded on an affidavit of the tenant's attorney, which stated—that the property claimed in the action consisted of three fourths of a certain piece or parcel of land, situated in the parish of *Kilnsea*, in the county of *York*, near the *Spurn-Point* of the river *Humber*, with all rights, members, and appurtenances belonging thereto; and also three-fourth parts of certain light-houses erected and being on the said land; and that the revenues, profits, and duties arising from, and payable in respect of, such light-houses, were of very

great annual value, three fourth parts thereof being to the amount of 6,000*l.* by the year; that several acts of Parliament had been passed relating to the said light-houses, and the said revenues, profits, and duties; and that several difficult questions were likely to arise upon the construction of the said acts of Parliament, or some of them; that the said three fourths of the said piece or parcel of land, and the said light-houses erected thereupon, were claimed by the demandant in this cause, as alleged heir of *John Angell, Esq.*, late of *Stockwell*, in the county of *Surrey*, who died in the year *one thousand seven hundred and eighty-four*; and that the said *John Angell*, the alleged ancestor of the demandant, left a will, bearing date the *21st September, one thousand seven hundred and seventy-four*, and also several codicils; and that the said will and codicils were drawn and expressed in an involved and intricate style and manner, and in very ambiguous words, referring to certain pedigrees of the testator's family, of great length, obscurity, and antiquity, and containing numerous bequests, devises, and limitations; and thereby giving rise to numerous doubts and difficulties, both as to the legal import of many of the clauses and limitations of the said will, and also as to the persons therein designated and intended to be described; that, shortly after the said testator's death, the opinions of several eminent counsel were taken, as to the effect and construction of the said will, which persons did not agree; but all stated that great difficulties existed; which difficulties were likely to arise in the course of the trial of the action, as the deponent had been informed and believed; that the said testator did not leave any near relations, and that it was necessary to go through long and intricate pedigrees, involving many difficult questions of law and fact, as the deponent had been informed and believed, in order to ascertain who was the heir-at-law of the said testator; that the greater part of the witnesses for the tenant resided in *London*, and in

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other places much nearer to *Westminster* than to *York*; and the deponent verily believed that a claim of so complicated a nature must give rise to much difficulty and doubt, and would require to be discussed with the greatest learning, both from its intrinsic difficulties, and the importance of the right which it was brought forward to substantiate.

Wednesday,
 Feb. 8th.

Mr. Serjeant *Bosanquet* and Mr. Serjeant *Spankie* now shewed cause.—The affidavit upon which this rule was obtained, contains nothing to induce the Court to grant a trial at bar. It is a matter entirely within the discretion of the Court, and many circumstances must concur to authorize the application; a mere suggestion of the value of the property in dispute, or of the difficulties likely to arise in the progress of the cause, will not suffice: at all events, the nature of those difficulties should be explicitly pointed out. In *Crofts d. Dalby v. Wells* (a), the Court said that it was a general rule not to grant trials at bar, unless the case was of great difficulty, or required great examination; and Mr. Justice *Page* observed, that he was counsel in the case reported in *Salkeld* (b), and believed the reporter to be mistaken in making Lord *Holt* allow either value or difficulty to be sufficient for having a trial at bar; and the Court denied the motion, although Lord Chief Justice *Lee* said, that the matter in debate was of sufficient value. In *The King v. The Burgesses of Caermarthen* (c), the Court said: “The granting of a trial at bar is entirely in the discretion of the Court, and such a trial ought not to be granted without good reason; because it is very expensive to the parties, and the business of the other suitors is delayed by it. Neither the length of a cause, nor the value of the matter in question, is a sufficient ground for granting a trial at bar; and, in order to obtain one upon the

(a) Andrews, 271.

(b) 2 Salk. 648.

(c) Sayer, 79.

account of difficulty, it is not sufficient to say generally in an affidavit, that the cause is expected to be difficult; but the particular difficulty which is expected to arise ought to be pointed out, that the Court may judge whether it be sufficient for the granting of a trial at bar." In *Holmes d. Brown v. Brown* (a), the Court imposed on the applicant the terms of receiving *Nisi Prius* costs if he succeeded, and paying *bar* costs if he failed. In *The King v. Amery* (b), the Court said that they would exercise their own discretion in every case, upon the peculiar circumstances thereof. In *Lord Rivers v. Pratt* (c), the application was refused, although the question at issue was one of considerable difficulty and magnitude—to ascertain the boundaries of *Cranbourne Chase*. And in *Doe d. Angell v. Angell* (d), a trial at bar on the title in dispute in the present cause was refused by the Court of *King's Bench*.

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Mr. Serjeant *Vaughan* and Mr. Serjeant *Taddy*, in support of the rule.—No instance can be shewn, where, in a writ of right, a trial at bar has been refused. In *Luke v. Harris* (e), it was doubted whether the *mise* might be tried at the assizes, or only at the bar of the Court. This is, at all events, a fit case for the exercise of the discretion of the Court, in granting a trial at bar; the property in dispute is of great value, and the case embraces questions of the greatest possible doubt and difficulty; and, although the subject matter of the present suit is confined to *Yorkshire*, still there are estates in several other counties depending on the same title. In *Doe d. Angell v. Angell*, the party claimed under the will, and not as heir-at-law. In *Lord Rivers v. Pratt*, the application was refused, on the ground that a cause involving the same question had

(a) 2 Doug. 437.

(b) 1 Term Rep. 363.

(c) 3 B. Moore, 582.

(d) 2 Tidd's Pr. 9th Edit. p. 747.

(e) 2 Sir W. Blac. 1293.

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just before been tried at *Nisi Prius*, wherein the Court of *King's Bench* had refused a new trial. In the present instance, great difficulties arise both on the construction of the will, and of the acts of Parliament by which the property in question is vested in the *Angell* family. The rights of of the Crown, too, are involved.

Lord Chief Justice BEST.—No sufficient ground has been shewn to induce us to accede to this application. It is clearly a matter of discretion with the Court; and, when we consider the extreme inconvenience and difficulty that must necessarily arise from causing *twenty-four* Jurors to be brought from *Yorkshire*, the enormous expense and the casualties to which the parties would be exposed, and the possibility of the cause not being able to be proceeded in, on account of the absence of some one of the knights or recognitors forming the grand assize, a case of almost imperative necessity must be made out before we can yield assent to such an application. Nothing of this sort has been pointed out to us; it is merely suggested “that a claim of so complicated a nature must give rise to much difficulty and doubt.” But no specific difficulty has been presented to us, to enable us to judge whether or not this cause may properly be tried at the assizes. The nature of the difficulties on the acts of Parliament has not been stated, nor has the will been shewn to us. The verdict in this cause cannot in any shape affect the rights of the Crown. The same difficulties that are apprehended here must have arisen in *Doe d. Angell v. Angell*; the tenant's title being the same in both. That case depended on the construction of the will that is to be produced in this, and the Court of *King's Bench* refused to allow a trial at bar. I, therefore, think that there is no reason for our granting it now.

The rest of the Court concurring—

Rule discharged.

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Thursday,
Feb. 9th.

CROWDER v. AUSTIN.

THIS was an action brought by the plaintiff to recover the value of a horse sold by him to the defendant, a horse-dealer, at a public auction at *Aldridge's Repository*. At the trial, before Lord Chief Justice *Best*, at the Adjourned Sittings at *Guildhall*, after last *Michaelmas* Term, it appeared that it was one of the conditions of sale "that each horse should be sold to the best bidder;" that the plaintiff's groom attended at the sale, on the part of his master, for the purpose of raising the price; that the last *bond fide* bidder had bid 12*l.*, after which, until the horse was knocked down to the defendant for 29*l.*, he and the groom were the only bidders; and that, when the defendant discovered against whom he had been bidding, he refused to take the horse.

The plaintiff put up a horse to sale at a public auction, and sent his servant to bid for him, to enhance the price. The last *bond fide* bid was 12*l.*, and the horse was ultimately knocked down at 29*l.* :—*Held*, that the bidding by the servant was a fraud upon the purchaser, and, consequently, that the sale was void.

His Lordship was of opinion that the clandestine bidding of the servant on behalf of his master, was a fraud upon the purchaser, and vitiated the sale.

The plaintiff was accordingly nonsuited.

Mr. Serjeant *Wilde*, on a former day, moved for a rule *nisi* that the nonsuit might be set aside, and a new trial had.—Bidding at auctions, with a view to buy in, has now become the recognised practice of auctions. No purchaser can be deceived by it. The statute which regulates sales by auction (*a*) merely requires, for the protection of the revenue, that, if any person attend on behalf of the seller, notice of that fact shall be previously given to the auctioneer, and an entry thereof made in his book; in the present instance, that requisition was complied with. In *Conolly v. Parsons* (*b*), the vendor employed persons to bid for him, without notice; and that was held to be no

(*a*) 17 Geo. 3, c. 50, s. 10.(*b*) 3 Ves. 627, n.

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objection to the sale. The case of *Howard v. Castle* (a), where a contrary rule was established, turned upon the presumption that fraud had been practised; Lord *Kenyon* said: "It appeared at the trial that the whole transaction was bottomed in fraud; it was fraud from the beginning to the end, and the parties did not meet on equal terms." The language used by Lord *Mansfield*, in *Bexwell v. Christie* (b), had reference to a period when the practice of reservation on sales by auction differed widely from that of the present day. His Lordship there said: "The question is, whether a bidding by the owner of goods at a sale, under these conditions, *viz.* 'that the highest bidder shall be the purchaser, and, if a dispute arise, to be decided by a majority of the persons present,' is a bidding within the meaning of such conditions of sale; and whether the owner can *privately* employ another person to bid for him. The basis of all dealings ought to be good faith; so, more especially, in these transactions, where the public are brought together upon a confidence that the articles set up to sale will be disposed of to the highest real bidder; that could never be the case, if the owner might secretly and privately enhance the price by a person employed for that purpose: yet tricks and practices of this kind daily increase, and grow so frequent, that good men give into the ways of the bad and dishonest, in their own defence. But such a practice was never openly avowed. An owner of goods set up to sale at an auction, never yet bid in the room for himself. If such a practice were allowed, no one would bid. It is a fraud upon the sale, and upon the public." The reasoning of his Lordship must, however, be viewed with reference to the particular facts before him. In the present instance, the defendant, being a horse-dealer, could not be deceived as to the value of the horse.

(a) 6 Term Rep. 642.

(b) Cowp. 396.

Lord Chief Justice BEST.—My opinion is the same now as it was at *Nisi Prius*; but, perhaps, before we lay down a general rule that is to govern future auctions, it may be fit that there should be a rule *nisi*.

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Mr. Justice PARK.—As at present advised, I entertain no doubt. I entirely concur in the opinion expressed by Lord *Mansfield*; as to which Lord *Kenyon*, in *Howard v. Castle*, said (a): “The whole of the reasoning of Lord *Mansfield*, in *Bexwell v. Christie*, is founded on the noblest principles of morality and justice—principles that are calculated to preserve honesty between man and man. The circumstance of puffers bidding at auctions has been always complained of. If the first case of this kind had been tried before me, perhaps I should have hesitated a little before I determined it; but Lord *Mansfield*’s comprehensive mind saw it in its true colours, as founded in fraud: he met the question fairly, and made a precedent which I am happy to follow.” But for the wish expressed by my Lord Chief Justice, I should say, the rule ought not to be granted.

Mr. Justice BURROUGH concurred in opinion with Mr. Justice *Park*.

Mr. Justice GASELEE thought, that, as the case was one of great importance, a rule *nisi* might be granted; but, at the same time, expressed his assent to the doctrine laid down by Lords *Mansfield* and *Kenyon*.

A rule *nisi* having accordingly been granted—

Mr. Serjeant *Taddy* was now about to shew cause, when—

(a) 6 Term Rep. 634.

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Mr. Serjeant *Wilde*, finding the impression of the Court still against him, consented that the rule should be—

Discharged.

Friday,
 Feb. 10th.

SNOW and Others v. PEACOCK and Others.

A bank-note for 500*l.* was stolen from a servant of the plaintiffs. The fact of the robbery was advertised in the *Hue and Cry Gazette*, and in another paper. Some time afterwards, the note was received at the banking-house of the defendants in the country, where it had been presented for change by a stranger, of whom no questions were asked as to the manner in which he became possessed of it. In trover to recover the value, the Judge left it to the Jury to say whether or not due notice of the robbery had been given by the plaintiffs, and whether or not, under the circumstances, due caution had been observed by the defendants, in taking the note.

THIS was an action of trover, to recover the value of a Bank of *England* note for 500*l.* The cause was tried before Lord Chief Justice *Best*, at the Sittings at *Guildhall* after last *Michaelmas* Term, when the following facts appeared in evidence:—

The plaintiffs were bankers in *London*. The defendants also were bankers, carrying on business at *Sleaford* and at *Bourn*, in *Lincolnshire*. In *September*, 1824, the plaintiffs received from a customer a dividend warrant for 1,379*l.*, with instructions to obtain the money due thereon, and place the amount to his credit. The plaintiffs' clerk sent it on the following day, by the hands of a confidential porter (since deceased), to the Bank of *England*, where the porter received the sum mentioned in the warrant, in Bank of *England* notes (and, among others, the note the subject of the present action), of which notes, on his return home, he stated that he had been robbed. The plaintiffs immediately made application at the public office in *Bow Street*, issued hand-bills describing the lost notes, and advertised their dates, numbers, and amount, in the *Hue and Cry Gazette*, and in the *Morning Advertiser*. No information relative to any of the notes was received until *April*, 1825. On the 24th of that month, the note in question was presented, by the *London* agent of the defendants, at the Bank, where it was stopped. It had been.

The Jury thought that the defendants had not exercised due caution, and accordingly found for the plaintiffs:—The Court held that this direction was proper, and refused to disturb the verdict.

brought to the defendants' banking-house at *Bourn*, at a time when several fairs were held in that part of the country, by a stranger, who requested in exchange for it Bank of *England* notes of smaller amount. On being told by the defendants' clerk that it was not usual to give Bank of *England* notes in exchange, this person consented to take in lieu notes of the *Sleaford* Bank. The name the stranger gave was *Edwards*. No further inquiry was made of him, and the clerk changed the note, which was sent to the defendants' agent in *London* on the day on which it was received.

On the part of the plaintiffs, the only evidence as to the notice of the robbery, was that of the wife of the printer of the *Hue and Cry*, who stated, that this Gazette was circulated by the order, and at the expense, of Government; that copies were sent to all the magistrates and gaolers throughout the country; that fifteen of them were sent into *Lincolnshire*; and that she believed one of the partners in the defendants' banking-establishment (who it appeared was a magistrate) to be one of those persons to whom the Gazette was forwarded. Evidence was also given as to the practice in *London* when a stranger applied at a banking-house for change of a note. Two witnesses—one, a clerk of the plaintiffs, who had formerly, for a period of fourteen or fifteen years, been in the employ of Messrs. *Cox & Greenwood*; the other, a clerk from the Bank of *England*—stated, that it was not the practice of *London* bankers to give change for large notes, when the parties applying were unknown to them, without requiring information as to the names and addresses of such persons, and answers to all such questions as it might be deemed advisable to put to them.

On the part of the defendants, the clerk by whom the note was received was called. He stated that the manner in which he had changed the note was that which was usual in the defendants' business; that he had never seen

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the *Hue and Cry* Gazette; and that he had not the slightest suspicion, or cause to suspect, at the time the note was presented to him, that it had been stolen: but he admitted that he had no recollection of having ever given change for a note of so large amount, during the *eleven* years that he had been in the employ of the defendants.

The Lord Chief Justice, on this evidence, left it to the Jury to say, whether the plaintiffs had used due diligence in advertising the stolen notes, and circulating intelligence of the robbery; and whether due caution had been observed by the defendants, or their clerk, in changing a note of so large amount for a person who was an entire stranger, without some previous inquiry as to the character of the party, and the mode in which he had become possessed of it.

The Jury thought that the defendants had not exercised due caution in this particular, and accordingly returned a verdict for the plaintiffs, for the amount of the note.

Mr. Serjeant *Wilde*, on a former day in this Term, moved for a rule *nisi* that this verdict might be set aside and a new trial had (a).—Evidence of the practice prevailing in *London*, as to changing notes, should not have been received to shew what ought to be the practice elsewhere. To protect a party receiving a bank-note, nothing more is necessary than that he should be the *bonâ fide* holder, for a valuable consideration. In such case, his title is good against all the world, whether his clerk or servant act with what a Jury might call due caution, or not. In this respect, bank-notes widely differ from every other species of property. A man who takes an instru-

(a) The learned Serjeant at first contended, that the declarations of the deceased porter, from whom it was alleged that the notes were stolen, were not receivable, and,

consequently, that there was no evidence to shew that the notes had ever been in the possession of the plaintiffs. The Court overruled the objection.

ment of another kind is bound to be cautious; but, in taking a bank-note, which is a part of the circulating medium of the country, it is sufficient if the circumstances under which it comes to his hands be such as are not reasonably calculated to excite suspicion. The integrity of the defendants in this case was unquestioned. Every presumption is in favour of the title of the holder of a bank-note, until something may arise to impeach it; and as, in this case, there was no appearance of any thing to create suspicion, the defendants' clerk, who received the note, was perfectly justified in supposing that the title of the party presenting it was good. At all events, the question should have been left to the Jury entirely as one of *bona fides* or *mala fides*, of which the presence or the absence of a due degree of caution on the part of the defendants would form but one ingredient.

A rule having been granted—

Mr. Serjeant *Vaughan* and Mr. Serjeant *Bosanquet* now shewed cause.—The only question in the case is, whether this note was received by the defendants in the due course of business, and with proper caution; or, whether their having received it without making inquiry as to the residence and character of the person by whom it was offered, was not, in itself, a manifest want of the caution and prudent care which ought to have been observed. That question was distinctly and properly left to the Jury. They have found in the affirmative, and there can be no ground for disturbing their verdict. In *Solomons v. The Bank of England* (a), a bank-note for 500*l.* had been fraudulently obtained by some person unknown. On its being presented for payment, some time afterwards, by an agent of a foreigner, notice was given of the fraud, and the principal was desired to inform the Bank how he

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(a) 13 East, 135, n.

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came by it. The only account he could give of it, was, that he had received it, in payment for goods, from a man dressed in a particular manner, but of whom he knew nothing. It was stated in evidence, that bank-notes of so large a value were not usually circulated in the country where this note was taken. In trover by the agent to recover from the Bank the value of the note, which had been detained by them under the authority of the original owner—it was held, that this was sufficient evidence to go to a Jury, of the privity of the principal to the original fraud. It is not enough to shew that a bank-note of such an amount is taken *bond fide*. It must be shewn that the party receiving it exercised a reasonable discretion in so doing. If he fail in this, it is a degree of negligence which amounts to a species of *mala fides*. In *Down v. Halling* (a), the owner of a banker's check for 50*l.* accidentally lost it. The check was, five days afterwards, tendered to the defendants, shop-keepers, in payment for goods purchased of them, to the value of 6*l.* 10*s.* 0*d.*, the defendants giving the difference in cash. On the following day, the defendants presented the check, and received the amount. In trover by the original owner, to recover the value from the defendants, the Jury were directed to find for the plaintiff, if they thought that the defendants had taken the check under circumstances which ought to have excited the suspicion of prudent men. The learned Judge who tried the cause (Lord Chief Justice *Abbott*), at the same time, observed, that there was no evidence to shew, that, in taking the check, the defendants had acted fraudulently; but that the question was, whether they had not acted with negligence. In *Gill v. Cubitt* (b), a bill of exchange which had been stolen in the course of the night, was taken, early on the following morning, to the office of a discount broker, by a person whose features were, but whose name

(a) 4 Barn. & Cress. 330; S. C. 6 Dow. & Ryl. 455.

(b) 3 Barn. & Cress. 466; S. C. 5 Dow. & Ryl. 324.

was not, known to the broker; and the latter, being satisfied with the name of the acceptor, discounted the bill, according to his usual practice, without making any inquiry of the person who brought it. In an action on the bill (by the broker against the acceptor), the Jury were directed to find for the defendant, if they thought that the broker had taken the bill under circumstances which ought to have excited the suspicion of a prudent and careful man: the Jury having found for the defendant, the Court afterwards refused to disturb the verdict—holding the direction to have been correct. In *Miller v. Race*, Lord Mansfield said (a): “An inn-keeper took the note *bond fide* in his business, from a person who made the appearance of a gentleman. Here is no pretence or suspicion of collusion with the robber; for, this matter was strictly inquired and examined into at the trial, and is so stated in the case, ‘that he took it for a full and valuable consideration, in the usual course of business.’ Indeed, if there had been any collusion, or any circumstances of unfair dealing, the case had been much otherwise. If it had been a note for 1,000*l.* it might have been suspicious; but *this was a small note*, for 2*l.* 10*s.* 0*d.* only, and money given in exchange for it.” In *Grant v. Vaughan*, Mr. Justice Wilmot said (b): “The note appears to have been taken by the plaintiff fairly and *bond fide*, in the course of trade, and even with the greatest caution: he made inquiry about it, and then gave the change for it; and there is not the least imputation, or pretence of suspicion, *that he had any notice of its being a lost note.*” In *Peacock v. Rhodes*, Lord Mansfield said (c): “The question of *mala fides* was for the consideration of the Jury. The circumstances that the buyer, and also the drawers (of the bill, the subject of the action), were strangers to the plaintiff, and that he took the bill for goods on which he had a pro-

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(a) 1 Burr. 458.

(b) 3 Burr. 1526.

(c) 2 Doug. 636.

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fit, were grounds of suspicion very fit for their consideration. But they have considered them, and have found that it was received in the course of trade; and therefore the case is clear." In *Egan v. Threlfall* (a), a Bank of England note for 1,000*l.*, dated the 12th October, 1820, was, in April, 1821, lost in London. In June, 1822, it was presented for change to a money-broker at Liverpool, by a person with whom the broker was well acquainted, but who was then in pecuniary difficulties; the broker changed the note, by giving bills which had some time to run, and cash, deducting commission, without asking how the holder became possessed of it. In trover by the original owner against the broker, it was held to be for the Jury to say, whether the defendant had received the note fairly and *bond fide*, in the ordinary course of business, and for value. The Jury found for the plaintiff, and the Court refused to grant a new trial. The case of *Lawson v. Weston* (b) was over-ruled by *Gill v. Cubitt*.

The general principle deducible from all the cases *in banc*, is, that, where a party takes a bill of exchange, bank-note, or check, without due caution, or out of the usual course and practice of trade, he takes it with every risk attached to it. In the present instance, the defendants' clerk cannot be said to have acted with proper caution, when, in a small provincial town, he changed a note of large value for a stranger; and the transaction cannot be said to have been in the usual course of business, for, the clerk admitted that he did not remember ever to have changed so large a note before. The Jury, therefore, were, under the circumstances, properly directed, and their verdict is conclusive.

Mr. Serjeant *Wilde* and Mr. Serjeant *Spankie*, in support of the rule.—The Jury should have been directed to

(a) 5 Dow. & Ryl. 326, n.

(b) 4 Esp. Rep. 56.

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consider two points—*First*, whether or not the defendants had taken the note in question *bond fide*, in the due course of business;—*Secondly*, whether there had or had not been a want of caution sufficient to raise a presumption of *mala fides*. In the former event, as the defendants had given value for the note, they would be entitled to retain it; and it is admitted, and expressly found by the Jury, that the conduct of the defendants was beyond the reach of suspicion. Where a loss must fall on one of two innocent parties, the maxim “*potior est conditio possidentis*” applies, provided he has acted *bond fide*. *Miller v. Race* is an express authority to shew that a bank-note, though stolen, becomes the property of a party who has given value for it, provided he have, at the time of receiving it, no notice or knowledge of the robbery. Lord *Mansfield* there said (a), that “a bank-note is constantly and universally, both at home and abroad, treated as money, as cash, and paid and received as cash; and that it is necessary, for the purposes of commerce, that their currency should be established and secured.” The same degree of caution cannot be used in the receipt or transfer of bank-notes, as in that of bills of exchange. In *Wookey v. Pole* (b) it was held, that the property in bank-notes, and bills of exchange indorsed in blank, passes absolutely by delivery. In *King v. Milsom* (c), in trover for a bank-note alleged to have been lost by the plaintiff, it was held that the defendant was not bound to shew his title to the note, without evidence from the other side that he got possession of it *mala fide*, or without consideration. Lord *Ellenborough* there said (d): “There is a distinction between negotiable instruments and common chattels. With respect to the former, possession is *prima facie* evidence of property. I must presume that the defendant, when possessed of this note, was a *bond fide* holder for a valuable consideration.

(a) 1 Burr. 459. (b) 4 Barn. & Ald. 1. (c) 2 Camp. 5. (d) Id. 7.

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It would greatly impair the credit, and impede the circulation of negotiable instruments, if persons holding them could, without strong evidence of fraud, be compelled by any prior holder to disclose the manner in which they received them." In *Lawson v. Weston*, the defendants, having lost a bill, caused an advertisement of the fact to be inserted in the newspapers; the plaintiffs discounted the bill for the person who found it: it was held, that they were entitled to recover on the bill, they having received it *bonâ fide*, and without notice of the fraudulent manner in which it had been obtained by the party from whom they took it. Lord *Kenyon* there said (a): "If there were any fraud in the transaction, or if a *bonâ fide* consideration had not been paid for the bill by the plaintiffs, to be sure they could not recover; but, to adopt the principle of the defence to the full extent stated, would be at once to paralyze the circulation of all the paper in the country. The circumstance of the bill having been lost, might have been material, if the defendants could bring knowledge of that fact home to the plaintiffs. The plaintiffs might or might not have seen the advertisement; and it would be going great length to say, that a banker was bound to make inquiry concerning every bill brought to him to discount; it would apply as well to a bill for 10*l.* as for 10,000*l.*" That reasoning applies even more forcibly to the case of a bank-note, than to that of a bill of exchange, or other negotiable security.

Lord Chief Justice BEST.—I think I should have been well warranted in putting this case to the Jury simply as one of *mala fides*. On the loss of a bank-note, or bill payable to bearer, immediate notice of the loss should be given to the public, in the manner most likely to prevent persons who would otherwise be ignorant of the fact, from

(a) 4 Esp. Rep. 56.

taking it; but, even if the lost note be not duly advertised, still, if a person receive it under circumstances reasonably calculated to induce a belief that he knew the holder to have possessed himself of it improperly, the loser is entitled to recover. If, after notice, a party take a note from a stranger, and abstain from making such inquiries as prudence and fair dealing would suggest to a man of business, the owner may also in that case recover its value, in an action against him who has so received it; for, the negligence of the one is no excuse for the dishonesty of the other, though it might be for the mere negligence. In the latter case, the maxim that has been referred to at the bar, *potior est conditio possidentis*, might apply. It is more frequently from negligence than from fraud that injuries result to third persons. In this case, there was no ground for suspecting for a moment that the defendants' clerk had been actuated by any dishonest or undue motives, and the defendants themselves knew nothing whatever of the transaction. The clerk was, in all probability, anxious to get his employers' notes into circulation; and that anxiety put him off his guard, and prevented his making, respecting the person who offered him the note, that inquiry which he should have made; though it appears that this note was a much larger one than, in the course of the eleven years he had been in the defendants' service, he had ever before given change for. I left it to the Jury to say, whether they thought that the plaintiffs had used due diligence in advertising the notes, and circulating intelligence of the robbery; and whether the defendants had exercised *due caution* in changing a note of such a large amount for a stranger, without first making some inquiry as to the manner in which he became possessed of it. This latter fact the Jury have found in the negative. A new trial has been moved for, on the ground of an alleged misdirection. It has been contended, that the question should have been left to the Jury simply as one of *bond fides* or

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mala fides; of which latter, the want of caution on the part of the defendant was to be taken merely as one of several component parts; and it has been said, that, if, in cases of this sort, any other question be raised, great uncertainty will inevitably be the result. There is no foundation for that argument. My direction to the Jury is supported by all the decisions *in banc*. Whether or not proper diligence has been used, will not be too intricate a question for a Jury to determine. What precise degree of caution should be used, and what inquiries should be made, before a bill or note is taken, common sense will dictate to every one. Bank-notes, though at first the mere creatures of commerce, have now become the general circulating medium of the country. In the course of the argument, it was said that bank-paper is money, and absolutely passes as such, by delivery. No lawyer or political economist has ever viewed it in this light; on the contrary, it is invariably held to be merely something exchangeable for money. For the purpose of this cause, there is no difference between a bank-note, and a bill of exchange payable to a particular person, and by him indorsed in blank: the value is in each case payable to the holder. Forming, as it does, the principal part of our circulating medium, it would be highly injurious to the commerce of the country, to hold a doctrine that would have the effect of curbing or restraining the negotiability of bank-notes. When this case was before me at *Nisi Prius*, I felt that it was one of extreme importance. I saw the difficulty of laying down a general rule on the subject. I, however, told the Jury, in my summing up, that I thought that the circulation of bank-notes could not be impeded by requiring every man that received them, to exercise that degree of caution which his own personal interest would prompt him to observe in all the concerns of life; and that the omission to use such caution would have a tendency to encourage the robbing of coaches, and the stealing of

notes by clerks and other servants. Since the trial, I have much considered this case; and I am perfectly satisfied, that the rule I then laid down is a wholesome one, and one which will rather have the effect of promoting than of checking the circulation of notes. In general, money cannot be identified; bank-notes easily may be. The stealing of notes has of late been greatly encouraged by the careless manner in which they are taken, and the consequent facility of passing them away without risk of detection. This evil will be considerably diminished by the adoption of a rule requiring the receivers to be vigilant. That which renders the possession of bank-notes more secure, cannot, surely, operate as a check on their circulation. The degree of caution necessary is merely that which is reasonably sufficient to satisfy the party taking the note, that he who tenders it is not likely to have become possessed of it by fraud or theft. After such inquiry as is reasonable, has been made, it may still happen that the receiver may have been imposed on; the negotiability of the instrument will then protect him. The receiver should receive it with proper circumspection and caution; the degree of caution in all cases depending, as in common sense it must, upon the value of the note; for, it would be absurd to say that the like caution must be used in taking a 5*l.* note, as in taking one for 500*l.*

I will now consider the several authorities on this subject, which are to be found in the books.

Lord *Mansfield*—who may truly be said to have been the founder of our commercial law, and who laid down those wise and excellent principles by which the commerce of the country is protected—in *Miller v. Race*, referred to a case decided by Lord *Holt* (a), who, speaking of the non-liability of the holder of a *lost note*, after it has been *paid away in currency*, says, that it is “by reason of the course

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(a) 1 Salk. 126.

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of trade, which creates a property in the assignee or bearer:" and his Lordship said (a): "Here, an inn-keeper took the note *bond fide* in his business, from a person who made the appearance of a gentleman. There is no pretence or suspicion of collusion with the robber; for, this matter was strictly inquired and examined into at the trial, and is so stated in the case—"that he took it for a full and valuable consideration, in the usual course of business.' Indeed, if there had been any collusion, or any circumstances of unfair dealing, the case had been much otherwise. If it had been a bank-note for 1,000*l.*, it might have been suspicious; but this was a small note, for 2*l.* 10*s.* 0*d.* only, and money given in exchange for it." In *Peacock v. Rhodes*, *Grant v. Vaughan*, and *Solomons v. The Bank of England*, the question was, whether the bills had been taken in the usual course of trade; or, in other words, whether they had been taken with that degree of caution which the usual course of trade prescribes. In *Grant v. Vaughan*, Mr. Justice Wilmot said (b): "If there was negligence on one side, and none on the other, that would turn the scale." These decisions shew, that caution and the usage of trade are the governing principles in cases of this description. It is for the Jury to consider the circumstances in which the parties stand. The doctrine laid down in the Court of *King's Bench*, in *Gill v. Cubitt*, clearly establishes the propriety of the direction I gave to the Jury, although, from the different circumstances of that case, it was somewhat differently put by Lord Chief Justice Abbott. His Lordship, in speaking of the case of *Lawson v. Weston*, says, that he thinks that that case has led to a great deal of mischief, and has greatly facilitated fraud; and he speaks of the number of stage-coaches that have been lately robbed of bank-notes and bills, and says, that it is owing to the encouragement that has been given

(a) 1 Burr. 458.

(b) 3 Burr. 1526.

to that species of robbery, by the facility with which they are received by country bankers, who have been, in fact, destroying their own interest, by their avidity to get hold of bank-notes, for the purpose of distributing in the country their own notes in exchange. His Lordship says (a): "It appears to me to be for the interest of commerce, that no person should take a security of this kind from another, without using *reasonable caution*. If he take such a security from a person whom he knows, and whom he can find out, no complaint can be made of him; but, if it is to be laid down as the law of the land, that a person may take a security of this kind from a person of whom he knows nothing, and of whom he makes no inquiry at all, it appears to me that such a decision would be more injurious to commerce than convenient for it." In conclusion, his Lordship said: "It seems to me, that it is a great encouragement to fraud, and it is the duty of the Court to lay down such rules as tend to prevent fraud and robbery, and not give encouragement to them." To that doctrine I fully subscribe, and I think it is the duty of the Courts to give effect to so salutary a rule. We shall thus be establishing a principle which cannot fail to have the effect of giving increased protection to property of this nature, and preventing many felonies. In the case last cited, Mr. Justice *Holroyd* said (b): "If a party takes a bill, with a view to profit arising from interest or commission, under circumstances affording reasonable ground of suspicion, without inquiring whether the party of whom he takes it, came by it honestly or not; or, if he takes it merely because it is drawn upon a good acceptor; then he takes it at a risk (or what ought, in the contemplation of a reasonable man, to be a risk), whether the bill be stolen or not." In the case of *Down v. Halling*, the question was left to the Jury exactly as I left it in this. The Court, on mo-

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(a) 3 Barn. & Cress. 471.

(b) *Id.* 476.

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tion, refused a rule in that case, not doubting the propriety of the Lord Chief Justice's direction.

On the whole, I think we shall best consult the true interests of commerce, by obliging tradesmen and others, in receiving bank-notes or negotiable bills, to use that caution and circumspection which the usage of trade requires in all other matters connected with it. In the present instance, the Jury have found that due caution was not observed by the defendants. I am, therefore, decidedly of opinion, that such want of caution was sufficient to entitle the plaintiffs to a verdict.

Mr. Justice PARK.—I think we should be deciding in opposition to all the cases, if we were to say that the direction of my Lord Chief Justice to the Jury in this case was improper. Our decision will, I think, be perfectly consistent with every one of the authorities upon this subject. *Miller v. Race* was not a case of suspicion. There, an inn-keeper received a bill or note for 21*l.* 10*s.* 0*d.*, in the ordinary course of his business. What Lord *Mansfield's* opinion would have been in a case like this, is evident: he says (a)—“If it had been a note for 1,000*l.*, it might have been suspicious; but this was a small note, for 21*l.* 10*s.* 0*d.* only, and money given in exchange for it.” In *Peacock v. Rhodes*, the principal question was, whether the case had been properly left to the Jury. Lord *Mansfield* there says (b): “The question of *mala fides* was for the consideration of the Jury: the circumstances that the buyer, and also the drawers, were strangers to the plaintiff, and that he took the bill for goods, on which he had a profit, were grounds of suspicion very fit for their consideration; but, they have considered them, and found that it was received in the course of trade; and therefore the case is clear.” It is impossible to distinguish *Solomons v. The Bank of England* from this case. The rea-

(a) 1 Burr. 458.

(b) 2 Doug. 636.

soning of Lord *Kenyon* there, is very different from the opinion expressed by him in *Lawson v. Weston*, where he says (a): "The circumstance of the bill having been lost, might have been material, if the defendants could bring knowledge of that fact home to the plaintiffs. The plaintiffs might or might not have seen the advertisement; and it would be going great length to say that a banker was bound to make inquiry concerning every bill brought to him to discount; it would apply as well to a bill for 10*l.*, as for 10,000*l.*" But, in *Solomons v. The Bank of England*, his Lordship says (b): "When the plaintiffs were informed of the circumstances, and were applied to, in order to give information of the person from whom they received the bill, they refused to give a satisfactory account of it. Under these circumstances, it is impossible to say that there was not some suspicion thrown upon them of their being privy to the fraud; and that was all that I told the Jury, to whom I was about to leave the question of fact for their decision."

Though I admit that it is of the greatest importance that bank-notes should not be impeded in their circulation, I entirely concur with my Lord Chief Justice in his mode of putting this case to the Jury; and I think that the rule adopted by his Lordship, is one that is calculated to benefit commerce, rather than obstruct it. In *Gill v. Cubitt*, the Court held, that the Jury were properly directed to find a verdict for the defendant, if they thought that the plaintiff had taken the bill under circumstances which ought to have excited the suspicion of a prudent and careful man. In *Grant v. Vaughan*, Mr. Justice *Wilmot* says, the thing to be inquired of, is, on whose side is the negligence. In the case now under consideration, there was no negligence on the part of the plaintiffs; but, on the part of the defendants, through the instrumentality of their clerk, there was great negligence. It was admit-

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(a) 4 Esp. Rep. 57.

(b) 13 East, 138.

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ted by the latter, on his examination at the trial, that, during the whole period (eleven years) of his service with the defendants, he did not remember to have ever changed so large a note. How, then, could this note be said to have been taken by the defendants in the usual course of their business?

Under the circumstances, I think our judgment should be guided by the case of *Gill v. Cubitt*.

Mr. Justice BURROUGH.—I am clearly of opinion that this note was received by the defendants under circumstances reasonably calculated to excite their suspicion, and to induce them to be more cautious than they appear to have been. A note of large amount was presented at a banking-house, for the purpose of being changed, by a person of whom they asked nothing more than his name: and, consequently, the only account they had of him, was, that his name was *Edwards*. They should have gone further; they should have asked where he came from, and how he became possessed of the note. Parties are not to be careless in cases of this sort, where their duty to the public requires that they should be active and cautious; neither are they to refrain from asking questions, lest such questions should prevent them from obtaining a note that would give them the benefit of increasing the circulation of their own notes. These defendants have not pursued a course tending to protect the public from frauds of this kind. If they had used ordinary care and caution, the parties might have been spared the trouble and expense of coming here. They have not, however, acted with due care.

The case of *Solomons v. The Bank of England* (a), it is impossible to distinguish from this. That was an action of trover, to recover the value of a bank-note for 500*l.*, which had been stolen from *Batson & Co.*

(a) The learned Judge cited this case from a MS. note.

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The note was received by the plaintiffs from *Hymen & Hendricks*, Jews, at *Middleburgh*. Being for a large amount, it was not a note of ordinary currency. The plaintiff, who was the agent of *Hymen & Co.*, came to the Bank of *England*, to ask if the note was good, and told all the circumstances. He produced the letter inclosing the note, and said that he had received it as the agent of *Hymen & Co.*, and had accepted bills for the amount. In consequence of what passed, he wrote to his correspondents at *Middleburgh*, to ascertain how they came by the note. They only answered, that they had received it from a man in an olive coloured coat. Lord *Kenyon* told the Jury, that he did not think *Hymen & Co.* had properly accounted for the possession of the note. The plaintiff was nonsuited; and, afterwards, when the case was moved *in banc*, his Lordship said—The house at *Middleburgh* ought to have given some account how they came by the note; notes of this amount not being ordinarily current there. If they received it contrary to conscience, they ought not to recover it. The Bank had a right to say—‘shew us that you hold this note properly;’ that is the point; not *mala fides*. And Mr. Justice *Buller* said—I consider the plaintiff as the agent of *Hendricks & Co.*, and the plaintiff’s title is incomplete. The defendants prove that the bill is improperly obtained; the plaintiff has notice of it. If it was not stolen, but honestly obtained, *Hendricks & Co.* should shew it; but they give no account of it at all. It is impossible they should not know of whom they had it. It would be otherwise, if it were a 10*l.* note.

In the present case, the defendants were bound to know of whom they received this note. They should have made inquiry; they would then, doubtless, have discovered who this person was. At the last Assizes for *Kingston*, I tried a man for passing stolen notes. On that occasion, it was proved that *Edwards* (this very man) had accompanied him. *Edwards* was very well known to the police, and I am satisfied that his description would have been found in the *Hue*

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and Cry. I am decidedly of opinion that the Lord Chief Justice's direction to the Jury was substantially correct, and that the verdict ought not to be disturbed.

Mr. Justice GASELEE.—I am also of opinion, that, in this case, it was properly left to the Jury to say, whether or not due caution and diligence had been observed by the defendants; and that it was not necessary to treat the question as one of *mala fides* only. Independently of decided cases, the present may, I think, be determined upon principle. Property which has been the subject of felony does not pass like other property. The convenience of commerce alone creates an exception to that rule, *viz.* as to goods bought in *market overt*. It has been said, that the holder of a Bank of *England* note has a *prima facie* property in it; these notes being part of the currency of the realm. But that is not exactly so; for, if any thing occurs to impeach the holder's title, or to cast the slightest suspicion upon it, it is incumbent on him to shew how he has conducted himself in the acquiring of it. If he has not used due caution, the whole *onus* of proof, that the party from whom he took it had in it such a title as he could lawfully convey, is thrown upon him. In the present case, it is found by the Jury, that the defendants failed to use that necessary caution. The circumstances well warrant this conclusion. The note was taken from a perfect stranger, one who had never before been seen at *Bourn*, and not the slightest inquiry was previously made concerning him. I, therefore, concur with the rest of the Court in thinking that this verdict ought not to be disturbed.

Rule discharged (a).

(a) See the case of *Beckwith v. Corrall and Another* (3 Bing. 444, and *post*, 335), where, in an action of trover by the owner of a lost bill of exchange against a banker who had cashed it for a stranger, it was held that the Jury were properly

directed to consider whether the plaintiff had used due diligence in apprising the public of his loss, and whether the defendant had acted with good faith and sufficient caution in the receipt of the bill.

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MARTIN and Another, Assignees of MARY COWPER, a
Bankrupt, v. NIGHTINGALE, Bart.

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THIS was an action of trover, by the assignees of *Mary Cowper*, a bankrupt, against the defendant, the Sheriff of *Cambridgeshire*, for taking in execution goods alleged to be of the estate of the bankrupt.

At the trial, at the last *Cambridge Assizes*, before Lord Chief Justice *Abbott*, a witness was called, on the part of the plaintiffs, to prove the trading. This witness stated, that the husband of the bankrupt had formerly carried on the business of a livery-stable keeper and horse-dealer; that, after his death, the bankrupt, his widow, continued the business, but had never obtained a horse-dealer's licence. Another witness proved his having bought horses for the bankrupt, for the purpose of letting; and that she occasionally sold them.

A livery-stable keeper who bought horses for the purpose of letting out, occasionally sold them, but without having a horse-dealer's licence. At the trial, the Judge expressed himself of opinion, and the defendant's counsel assented, that this was a sufficient trading within the meaning of the bankrupt act. The Court refused to disturb the verdict.

His Lordship thought this sufficient evidence of trading, and, the defendant's counsel acquiescing in this opinion, the point was not left to the Jury. A verdict was found for the plaintiffs.

Mr. Serjeant *Wilde*, on a former day in this Term, obtained a rule *nisi*, that this verdict might be set aside, and a new trial granted, on the ground that the fact of the trading of the bankrupt had not been sufficiently proved, or that it should, at all events, have been left to the Jury.

Mr. Serjeant *Vaughan* shewed cause, and contended that the trading was satisfactorily established, as, although the horses were in the first instance bought for the mere purpose of letting, it was proved that they were also occasionally sold. He referred to the case of *Bartholomew v.*

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Sherwood (a), where a farmer, who had bought and sold horses with a view to profit, was held a trader; and *Wright v. Bird* (b), where the Court of *Exchequer* held the buying and selling of horses, with an avowed intention of taking out a licence and becoming a horse-dealer, sufficient to constitute a trading within the bankrupt laws, however limited the trading, and though no licence had been actually taken out.

Mr. Serjeant *Wilde*, in support of his rule, submitted that the mere casual sale of a horse was not sufficient to constitute a general trading, as the purchases were at first clearly made for no other purpose than the carrying on the business of a livery-stable keeper: and he cited the case of *Patten v. Browne* (c), to shew that a sale made only as ancillary to a business, which, of itself, is not a trading, does not render a person a trader within the meaning of the bankrupt laws.

Cur. adv. vult.

Lord Chief Justice BEST now said, that the Court were of opinion, that there was sufficient evidence of trading to go to the Jury; that he had spoken to Lord Chief Justice *Abbott*, who stated that the defendant's counsel acquiesced in the opinion he had expressed at the trial, and, with their consent, the question was withdrawn from the consideration of the Jury; and that, therefore, the Court would not disturb the verdict.

Rule discharged.

(a) 1 Term Rep. 573, n.

(b) 1 Price, 20.

(c) 7 Taunt. 409.

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———, Demandant; RUSSELL, Tenant; WALCOTT,
Vouchee.

MR. Serjeant *Onslow* moved that this recovery might pass, under the following circumstances:—

The warrant of attorney was executed by the vouchee on the 7th of *December* last. At that period he was sane; but, since the time of his executing the warrant of attorney, and before the recovery could pass, his intellect had become impaired.

The learned Serjeant relied on the case of *Selwyn v. Selwyn* (a), to shew, that, in law, the whole of a recovery must be taken to be the transaction of one day.

Per Curiam.—The recovery is incomplete; and, at any time before it is perfected, the vouchee might, if he were restored to reason, revoke the warrant of attorney; or, if he should die in the mean time, the recovery would be a nullity. Being insane, he is *civiliter mortuus*. In *Sheepshanks v. Lucas* (b), it was held that the death of a vouchee in a common recovery, before judgment, is a ground of error, if it be afterwards perfected.

The learned Serjeant, therefore—

Took nothing (c).

(a) 2 Burr. 1131.

(b) 1 Burr. 410.

(c) See *Egremont*, Demandant; ———, Tenant; *Vale* and *Crooke*, Vouchees, (2 Moore & Payne, 264; S. C. 5 Bing. 176), where, one of two vouchees having become insane after he had executed a joint warrant of attorney, but before the perfecting of the recovery, the Court al-

lowed it to pass as to all the parties except him. See also *Jameson*, Plaintiff; *Fletcher* and Wife and Others, Deforciantes (2 Moore & Payne, 265, n), where, one of several deforciantes having become insane, the Court ordered the fine to pass as to all the other parties, notwithstanding the omission of the name of the lunatic in the proceedings.

Where the vouchee became insane after the execution of the warrant of attorney, but before the perfecting of the recovery—The Court refused to allow it to pass.

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BERRY V. JENKINS.

An attorney having acted for both parties in a suit, the Court ordered the proceedings to be set aside, and the attorney to pay the costs of the cause and of the motion.

ON a former day in this Term, Mr. Serjeant *Wilde* obtained a rule, on the part of the defendant in this suit, calling on the plaintiff, or his attorney, to shew cause why the interlocutory judgment which had been signed herein, and all the proceedings previous thereto, should not be set aside for irregularity, and why the attorney should not pay the costs of the cause and of this application. The affidavit on which the motion was founded, stated, that the attorney had acted for both sides, putting in bail for the defendant, and deluding the parties, and preventing an interview.

Mr. Serjeant *Vaughan* was about to shew cause—

But the Court strongly reprobated the conduct of the attorney, in acting for both plaintiff and defendant at the same time, and ordered that the rule should be made absolute in the terms moved.

Rule absolute.

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YRISARRI V. CLEMENT.

An action will not lie for a libel imputing to a party fraud in his conduct touching an illegal transac-

THIS was an action for a libel published in a certain newspaper called "*The Morning Chronicle*," of which the defendant was proprietor.

tion; but, if the publication goes further, and conveys an imputation on the party, *dehors* such transaction, it is libellous.

In a declaration for a libel published concerning the plaintiff as *Envoy of the state of Chili*, it was alleged, by way of inducement, that the plaintiff was the Envoy appointed by the state of *Chili*:—*Held*, that the libel, on the face of it, sufficiently admitted *Chili* to be a state, and the plaintiff to be the Envoy of that state, to support the action.

A libel stated, that, "The plaintiff lost no time in transferring himself, together with 200,000*l*. sterling of *John Bull's* money, to *Paris*, where he now out-tops princes in his style of living." The *innuendo* to this was, "meaning that the plaintiff had defrauded *English* subjects of 200,000*l*."—*Held*, that the *innuendo* gave the words of the libel too extended a meaning; and that the libel did not impute to the plaintiff the commission of a fraud upon *English* subjects.

The first count of the declaration, after the usual inducement of good character and conduct, proceeded thus—

“ And whereas also, before the time of the committing the grievances by the said defendant in this count and the four next following counts mentioned, the said plaintiff had been and was appointed by certain persons exercising the powers or authority of government in a certain republic or state in parts beyond the seas, to wit, in the republic or state of *Chili*, in *South America*, to the office or station of Envoy Extraordinary and Minister Plenipotentiary from the said republic or state of *Chili*, to and at the Courts of *Europe*, and, amongst others, to the Court of this United Kingdom, to wit, at &c.: And whereas, before the time of the committing the grievances by the said defendant in this count and the four next following counts mentioned, the said plaintiff had been and was authorized, empowered, and directed, by the said persons exercising the powers or authority of government in the said republic or state of *Chili*, in *South America*, to negotiate a loan or loans for the service of the said republic or state of *Chili*, to wit, at &c.: And whereas also, before the committing of the grievances by the said defendant in this count and in the four next following counts mentioned, to wit, on the 1st *January*, 1820, the said plaintiff had come to and arrived in this country, and had become and was resident therein, to wit, at &c. aforesaid: And whereas also, before the committing of the grievances by the defendant in this count and the four next following counts mentioned, to wit, on the 1st *July* 1822, the said plaintiff, by virtue and in exercise of the said power and authority conferred on him by the said persons exercising the powers or authority of government in the said republic or state of *Chili*, in *South America*, had entered into, made, and concluded, for and on the part of the said republic or state of *Chili*, a contract with certain persons, to wit, *John*

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Hullett and *Charles Widder*, carrying on trade and commerce in the city of *London*, by and under the style and firm of *Hullett, Brothers, and Co.*, for raising a certain loan of money, to wit, a loan for 1,000,000*l.* sterling money of this kingdom, for the service of the said republic or state of *Chili*, by the sale of certain bonds or obligations, to wit, bonds or obligations of and on the part of the government of the said republic or state of *Chili*, which said bonds or obligations had been and were signed by the said plaintiff, as Envoy Extraordinary and Minister Plenipotentiary for the said republic or state of *Chili*, and by virtue and in exercise of the said power and authority conferred on him for that purpose, as aforesaid, and had been and were issued by him, the said plaintiff, to the said Messrs. *Hullett, Brothers, and Co.*, and had been and were sold and disposed of by and through the agency of them the said Messrs. *Hullett, Brothers, and Co.*, to divers subjects of this kingdom, as the buyers and purchasers thereof, to wit, at &c. aforesaid: And whereas also, before the time of the committing of the grievances by the said defendant in this count, and the four next following counts mentioned, one *John Hullett*, being one of the partners in the said house or firm of Messrs. *Hullett, Brothers, and Co.*, had been and was appointed by certain persons exercising the powers or authority of government in a certain other republic or state in parts beyond the seas, near or neighbouring to the before-mentioned republic or state of *Chili*, in *South America*, that is to say, in the republic or state of *Buenos Ayres*, in *South America*, Consul-General for the said republic or state of *Buenos Ayres*, in and towards this United Kingdom, to wit, at &c. aforesaid; yet the defendant, well knowing all and singular the premises aforesaid, but contriving and maliciously intending wrongfully and unjustly to hurt, injure, prejudice, and damnify, the said plaintiff

in his said good name, fame, credit, and reputation, and to bring him into public scandal, infamy, and disgrace, with and amongst all his neighbours, and other good and worthy subjects of this kingdom, and cause it to be suspected and believed by those neighbours and subjects, that he had been and was guilty of fraud, and otherwise to hurt, injure, prejudice, and damnify him, heretofore, to wit, on &c., at &c. aforesaid, did falsely and maliciously print and publish, and cause and procure to be printed and published, of and concerning the said plaintiff, and of and concerning the matters aforesaid, a certain false, scandalous, malicious, and defamatory libel, in a certain public newspaper, commonly called or known by the name of 'The *Morning Chronicle*,' in the form of a letter purporting to be written to the editor thereof, containing therein, amongst other things, the false, scandalous, malicious, and defamatory matter following, of and concerning the said plaintiff, and of and concerning the matters aforesaid, that is to say: 'I (meaning the person purporting to be the writer of the said letter) would ask another question not irrelevant on the present occasion. Why did the appointment of Consul-General (meaning the said appointment of Consul-General for the said republic or state of *Buenos Ayres*, in *South America*,) to *England*, fall on the person alluded to (meaning the said *John Hullett*)? It would not, surely, be owing to any approbation of his (meaning the said *John Hullett's*) conduct in meddling with the affairs of a neighbouring state (meaning the said republic or state of *Chili*, in *South America*), which state (meaning the said republic or state of *Chili*), without being in want of money, or even asking for it, this *London* agent (meaning the said *John Hullett*) saddles with a debt of one million of pounds, taken out of English pockets for the benefit, in reality, of himself (meaning the said *John Hullett*), and the Creole Spaniard (meaning

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the said plaintiff), who acted the part of Plenipotentiary to the Stock Exchange in that drama (meaning and insinuating thereby, that the said plaintiff, colluding with the said *John Hullett* to obtain money fraudulently, in the matter of the said loan for one million of pounds for the service of the said republic or state of *Chili*, in *South America*, had defrauded the English subjects of this kingdom). The latter worthy (meaning the said plaintiff), lost no time in transferring himself, together with two hundred thousand pounds sterling of *John Bull's* money, to *Paris* (meaning and intending thereby that the said plaintiff had fraudulently obtained two hundred thousand pounds sterling, of the money of the English subjects of our sovereign lord the King, and had fled from this country with the same), where he (meaning the said plaintiff), now out-tops princes in his (meaning the plaintiff's), style of living. This notorious transaction, that will occupy a prominent place in the annals of stock-jobbing fraud (meaning and insinuating thereby, that the said plaintiff had colluded with the said *John Hullett* in the matter of the said loan raised for the said republic or state of *Chili*, in *South America*, and had defrauded certain English subjects of this kingdom), ought to have warned official men of the *South American* state alluded to in Mr. *Canning's* speech, against trusting the management of their affairs in *England* to the same hands: but they have determined otherwise; and here are the consequences of their acting in contempt of public opinion. I (meaning the said person purporting to be the writer of the said letter,) write this, not for the *English* readers of the *Chronicle*, but for the *South Americans*; they will not be at a loss to supply the names here omitted.' "

The *second*, *third*, *fourth*, and *fifth* counts set out the same libel, " of and concerning the plaintiff, and the matters aforesaid," varying the *innuendos* thus:—" That the

plaintiff, in the matter of the said loan for the republic or state of *Chili*, had defrauded *English* subjects of two hundred thousand pounds sterling;”—“ That the plaintiff had acted fraudulently in the matter of the loan raised for the said republic or state of *Chili*;”—“ That the plaintiff had fraudulently obtained two hundred thousand pounds from *English* subjects;”—“ That the plaintiff had committed a fraud.”

The *sixth*, *seventh*, *eighth*, and *last* counts contained no inducement, nor any allusion to the introductory part of the *first* count; but merely set out the following:—“ The latter worthy lost no time in transferring himself, together with two hundred thousand pounds sterling of *John Bull's* money, to *Paris*, where he now out-tops princes in his style of living;” with *innuendos*—“ That the plaintiff had fraudulently obtained two hundred thousand pounds of the money of *English* subjects, and had fled with it out of this kingdom;”—“ That the plaintiff had left this country with two hundred thousand pounds, fraudulently obtained from *English* subjects;”—“ That the plaintiff had defrauded *English* subjects of two hundred thousand pounds;”—“ That the plaintiff had committed a fraud.”

At the trial, before Lord Chief Justice *Best*, at the Sitings after last *Michaelmas* Term, the publication of the alleged libel by the defendant was admitted. The Under Secretary of State for *Chili* proved, that, in the year 1818, the plaintiff was appointed Envoy Extraordinary from the State of *Chili* to all the Courts of *Europe*, and, amongst others, to that of this country; that he was authorized to raise a loan for the purposes of that state; that, then and since, the government of *Chili* had used a public seal; that, in 1818, the government was under the control and direction of Don *Bernardo O'Higgins*, under the title of Supreme Director of the Court of *Chili*; that the plaintiff was appointed Envoy by the Supreme Director; that

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the state of *Chili* comprised three provinces, of which two and a half were under an independent, republican government, at the head of which was *O'Higgins*—the other half still remaining in the hands of the *Old Spaniards*, who refused to recognize the new republic; and that, in those provinces which were under the authority of *Don Bernardo*, laws were made and enforced, and observed by the people.

The plaintiff then put in his appointment as Envoy Extraordinary to the Courts of *Europe*, under the seal of *Chili*; and also an authority to raise money for the purposes of the state. A deed, which was executed at *Paris*, and deposited in the Bank of *England*, was then put in. This deed charged the revenues of *Chili* with the payment of the loan to be raised by the plaintiff. A bond was also produced, by which it appeared that payments had been made. Evidence was then offered to shew the independence of the state of *Buenos Ayres*, and that Mr. *Hullett* had been appointed Consul, under the seal of that country.

For the defendant, it was objected, that the plaintiff had failed to prove the allegation in the declaration, that *Chili* and *Buenos Ayres* were states; they not being recognized as such by the government of this country.

The Lord Chief Justice said, that there were three descriptions of foreign states, *viz.*—states merely acknowledged as sovereign independent states—states connected by treaties with *England*—and sovereign states, unconnected with, and unacknowledged by, our government; that, in cases relative to the two first-mentioned descriptions of states, it is only necessary to prove that they have been acknowledged as sovereign independent states, by the government of this country; that, in many instances, even this proof would be unnecessary, the great states of the world being noticed in acts of Parliament made for the

confirmation of treaties, and the regulation of commercial intercourse with them, and these states, consequently, being taken judicial notice of by Courts of law; but that the existence of unacknowledged states must be proved by evidence that they are associations formed for mutual defence, acknowledging no authority *dehors* their own government, observing the rules of justice towards the subjects of other states, living generally under their own laws, and maintaining their independence by their own force. His Lordship, however, saved the point for the opinion of the Court.

It was then objected, that, as the plaintiff had been engaged in an illegal transaction, *vis.* raising a loan for a state which was at war with one in amity with the government of this country, he was not entitled to recover in a Court of Justice, for any thing said or written touching his conduct with reference to such transaction.

The Lord Chief Justice, being of opinion that the attack contained in the libel was not confined to the alleged illegal transaction, but reflected on the plaintiff's character *ultra* the subject of the loan, over-ruled the objection.

The Jury accordingly returned a verdict (generally) for the plaintiff—damages 400*l.*; and leave was given to the defendant to move that this verdict might be set aside, and a nonsuit entered, in case the Court should be of opinion that the plaintiff had not sufficiently proved the existence of the states of *Chili* and *Buenos Ayres*, as alleged in the declaration, and the appointments of the plaintiff and of Mr. *Hullett*, as Envoy Extraordinary, and Consul, under the seals of those states respectively.

Mr. Serjeant *Taddy*, on a former day in this Term, obtained a rule *nisi*, for a nonsuit, on the point reserved; and for a new trial, on the ground of the illegality of the transaction in which the plaintiff had been engaged. *Hunt*

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v. *Bell* (a). The learned Serjeant afterwards moved in arrest of judgment, on the ground that the *innuendo* in the *eighth* count—"that the plaintiff had defrauded *English* subjects of 200,000*l.*," gave the words of the libel a more extended interpretation than those words of themselves would reasonably bear: and he cited the case of *Holt v. Scholefield* (b), to shew, that, where, on a declaration for slander, some of the counts of which are supported and others not, and a general verdict is entered for damages on the whole declaration, the judgment cannot afterwards be entered on the good counts only.

Mr. Serjeant *Vaughan* and Mr. Serjeant *Spankie* shewed cause.—On the first point—that the states of *Chili* and *Buenos Ayres* were not states recognized by the government of this country—they cited *Grotius* (c), *Vattel* on the Law of Nations (d), *Folliott v. Ogden* (e), *Wright v. Nutt* (f), *Ogden v. Folliott*, in error (g), *The City of Berne v. The Bank of England* (h), and *Dolder v. The Bank of England* (i): and they submitted, that, at all events, the defendant was not in a situation to dispute the fact, he having himself, sufficiently for the purposes of the present action, admitted it on the face of the libel. They also contended, that the libel attacked the plaintiff in his private character, independently of the transaction alluded to; and that, therefore, the publication was libellous.

Mr. Serjeant *Taddy*, in support of the rule, was heard at considerable length; but, as the opinion of the Court

(a) 7 B. Moore, 212; S. C. 1 Bing. 1.

(b) 6 Term Rep. 691.

(c) Book 1, c. 1, s. 14.

(d) Book 1, c. 4; Book 3, c. . 18, ss. 292, 293.

(e) 1 H. Blac. 123.

(f) 1 H. Blac. 136, n.

(g) 3 Term Rep. 726.

(h) 9 Ves. 347.

(i) 10 Ves. 284, 352.

was confined to the point in arrest of judgment, on the ground that the *innuendo* put on the words of the libel a construction too extended, and gave no opinion on the other points, the argument is omitted.

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Lord Chief Justice BEST.—In this case, a motion has been made for a nonsuit, or a new trial; and also in arrest of judgment. In support of the former part of the motion, it has been contended, that the allegations in the declaration—that there is such a state as *Chili*, and that the plaintiff has been appointed Envoy from that state to the Court of this country; that there is such a state as *Buenos Ayres*; and that Mr. *Hullett* has been appointed Consul-General for that state—were not supported by the evidence. At the trial, I decided, that it sufficiently appeared, on the face of the libel, and from the evidence, that such states did exist; and the rest of the Court now concur with me. There is, consequently, no foundation for the objection taken on this point. The statement in the declaration, as to the existence of those states, was mere inducement; and, in an action for a libel, it is enough, if the libel itself admits that which is so alleged. The defendant in the present case has, on the face of the libel, admitted the existence of the states in question. It was proved that the plaintiff was appointed Envoy or Minister for *Chili*, and Mr. *Hullett*, Consul-General for *Buenos Ayres*. These several allegations, therefore, were fully and substantially made out.

Another ground of defence urged at the trial, was, that, as the plaintiff had been engaged in an illegal transaction, *vis.* raising a loan for a state which was at war with one in amity with the government of this country, he was not entitled to recover in a Court of Justice for any thing said or written touching his conduct with reference to such transaction. The case of *Hunt v. Bell* was cited

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in support of that position. With that decision I fully concur; for, when a person complains of a libel, if it be shewn that that libel has only reference to an illegal transaction in which the party has been engaged, it is an answer to the complaint; but still, such a defence will not avail, if fraud be imputed to him *ultra* such transaction. In this case, the libel was not confined to the public character of the plaintiff; he has been attacked in his private character also.

The objection raised in arrest of judgment is, that the *innuendo* in the *eighth* count, "that the plaintiff had defrauded *English* subjects of 200,000*l.*," gave the words of the libel too extended a meaning; and that the libel did not impute to the plaintiff the commission of a fraud upon the *English* nation. I thought, at the trial, that the libel did impute to the plaintiff the having committed a fraud upon the *English* nation; but, on further examination, I think the libel does not bear so extended a construction as is sought to be put upon it by the *innuendos*. In order to collect the true meaning of the libel, the whole of it must be taken together. There appears to me to be nothing in this publication to charge the plaintiff with defrauding the people of *England*. It charges him with defrauding the people of *Chili* only. If that be the true construction, the defendant is entitled to a new trial. The libel was in the form of a letter. It concluded with a statement that it was not written for the *English* readers of the *Chronicle*, but for the *South Americans*. It is, therefore, impossible to say that the writer meant to convey an insinuation that the plaintiff had been guilty of a fraud on the people of this country. He must be taken to have meant to say, that the plaintiff had raised for the people of *Chili* a loan which they did not want, and had applied the produce to his own purposes. If so, no more is conveyed than an imputation of a fraud practised upon the *Chilians*. The *innu-*

endo, therefore, "that the plaintiff had cheated *English* subjects," was not made out.

This point I did not reserve for the opinion of the Court, and therefore no nonsuit can be entered upon it; but, as it raises a new and important consideration, it is proper that the cause should be re-tried.

The rest of the Court concurring—

Rule absolute, for a new trial.

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CLARKE v. JOHNSON and Another.

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THIS was an action of *assumpsit*, for money had and received, brought by the plaintiff, the mother of a bastard child, to recover from the defendants the sum of 60*l.*, which had been deposited with them, as overseers of the poor of the township of *Osgodby*, near *Scarborough*, in *Yorkshire*, on the birth of the child, in 1818, for the purpose of indemnifying the township from any expenses that might be incurred in respect of the future maintenance of the child.

Parish officers can only require from the father of a bastard child a *security* to indemnify the parish from any charge for its maintenance. A deposit of money for that purpose is contrary to the policy of the law; and such deposit may be recovered back.

At the trial, before Mr. Justice *Bayley*, at the last Assizes at *York*, it appeared that the money was placed in a bank at *Scarborough*, in the joint names of the plaintiff and the defendants, the overseers of the township for the time being; that the bankers gave a receipt to both parties; that the plaintiff received interest, at the rate of 5*l.* *per cent.*, until 1821, when the bankers at *Scarborough* became bankrupts; and that the defendant *Johnson* proved under their commission, and received the sum of 15*l.* 14*s.* 3*d.*, being a dividend at the rate of five shillings in the pound, and interest. It also appeared that the child was still living; that the plaintiff, the mother, had never been taken before a magistrate; and that the child had never become chargeable to the township.

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The learned Judge was of opinion that there was a continuing liability or risk on the part of the township, the child being still alive; and he therefore nonsuited the plaintiff, reserving to her leave to move that the nonsuit might be set aside, and a new trial had, in case the Court should be of opinion that she was entitled to recover.

Mr. Serjeant *Vaughan*, on a former day in this Term, accordingly obtained a rule *nisi*. He submitted, that the payment to the overseers of a gross sum for the support of an illegitimate child, was illegal; and cited the case of *Cole v. Gower* (*a*), where it was held that the statute 6 Geo. 2, c. 31, only authorizes parish officers to take, from the putative father of a bastard child, a security to indemnify the parish from the possible charge of its maintenance.

Mr. Serjeant *Wilde* shewed cause.—In *Middleham v. Bellerby* (*b*), the putative father of a bastard child gave a *voluntary* bond to the parish officers, conditioned for the payment of a certain sum every three months, until the child should be *deemed* capable of providing for itself—it was held that the bond was good, and the condition sufficiently certain. Lord *Ellenborough* there said (*c*): “ If a duty be imposed by statute, the parties who are called upon to execute the duty must comply with its provisions; and, therefore, if the defendant had been apprehended under the statute (*d*), and had given the bond in order to relieve himself from commitment, there might have been much weight in the argument; but, the argument does not apply where the parties are not acting under the statute. This does not appear to be any thing more than a *voluntary obligation* entered into by the defendant, with the object

(*a*) 6 East, 110.

(*b*) 1 Maule & Selw. 310.

(*c*) 1 Maule & Selw. 311.

(*d*) 6 Geo. 2, c. 31.

of providing for the maintenance of his child; and, if we do not find that it is contrary to the general policy of the law, which was the case of *Cole v. Gower*, I see no reason why it should not have effect. The defendant still remains liable to indemnify the parish." Mr. Justice *Le Blanc* said (a): "If the party is brought before a magistrate, then the statute directs what shall be done; but, here, the party acts without any compulsion." So, in this case, the money was deposited without any compulsion whatever. It was not paid as a discharge, but was merely lodged in the bank, as an indemnity against the possibility of future charges being incurred by the township on account of the child. Overseers and churchwardens may take a bond of indemnity. There cannot, therefore, be any objection to their taking a conditional deposit of money for the like purpose. The township, though not actually burthened with the maintenance of the child, would still be subject to a certain degree of liability; the child might hereafter become chargeable. There was no unlawful bargain entered into; the object of the deposit was merely the indemnity of the township. The overseers were not obliged to take the mother of the child before a magistrate. If, however, they had done so, they would have had a bond to indemnify them from the future charge of the maintenance of the child; and that was the express purpose for which this deposit was made. Overseers are bound to account to their parishes or townships for whatever monies they receive. In *The King v. Martin* (b), it was held, that, if an overseer receive from the putative father of a bastard child born within the parish, a sum of money by way of composition for the maintenance of the child, he is liable to an indictment, if he fraudulently omit to give credit for such sum, in his accounts with the parish. In *Townson v. Wil-*

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(a) 1 Mau. & Selw. 312.

(b) 2 Camp. 268.

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son (a), it was held that money paid to parish officers by a person taken up under a warrant, as the putative father of a bastard child, by way of bargain with the parish, to be released from all future liability in respect of the child, might be recovered back from those who received it; notwithstanding that they might, before the commencement of the action, have gone out of office, and accounted with their successors for such portion of the money as had not been expended upon the child and upon the mother during her confinement. But, in that case, the contract was illegal, the money being taken as an absolute discharge of the liability of the father; and, therefore, the parish would have an interest in the death of the child; which is the chief objection taken by the Courts to transactions of this nature. That argument, however, cannot apply to this case.

Mr. Serjeant *Vaughan*, in support of the rule.—The deposit taken by the defendants in this case was unlawful; and, even supposing it were otherwise, the purpose for which it was made, has long since been answered, the child, which was born eight years since, having never become chargeable. The policy of the law has amply provided for cases of this kind (b), by empowering the Justices to punish parties chargeable with illegitimate offspring, and to prevent parishes from being improperly burthened. In *Cole v. Gower*, Mr. Justice *Le Blanc* said (c): “The Legislature have marked out to the parish-officers what line they are to pursue in taking the required security, and their duty towards the children. The parish officers are to call upon the father to give security for indemnifying the parish against the charge of maintaining the child,

(a) 1 Camp. 396.

(b) See the statutes, 18 Eliz. c. 3, s. 2—7 Jac. 1, c. 4, ss. 7, 8—

6 Geo. 2, c. 31—49 Geo. 3, c. 68, s. 3—and 54 Geo. 3, c. 170, s. 8.

(c) 6 East, 118.

whom they are bound to see provided for and taken care of; and the father is to be committed, if he do not give such security, or enter into recognizance to appear at the next Quarter Sessions, and abide their order. It is said, that the father might enter into such a contract with any individual; but we must distinguish this from a contract with private individuals: it is a contract with these plaintiffs as parish officers, and must, therefore, be construed with a reference to the statute which directs the security to be taken; the object of which was, the indemnity of the parishioners against the burthen of maintaining the child. Now, that object cannot be attained by taking an absolute security in the first instance, so well as by taking it as an indemnity; for, if the money be received immediately, the benefit is to those persons only who are then living in the parish, while the burthen may be thrown on future parishioners: whereas, the act meant that those who were to bear the burthen should have the benefit of the indemnity. Besides which, by taking an absolute security, a temptation is held out to the parish officers to neglect their duty." In the present case, the deposit was not made pursuant to the directions of the statutes, and therefore the plaintiff is entitled to maintain this action.

Cur. adv. vult.

Lord Chief Justice BEST now delivered the judgment of the Court.—

We are of opinion that the defendants in this case had no right to retain the sum which they had improperly received from the plaintiff, as a security for the indemnity of the township against the possible charge of the future maintenance of her child; and that this nonsuit ought to be set aside. Although, to avoid a painful disclosure, the plaintiff allowed the money to remain for a considerable period in the bank at *Scarborough*, receiving the interest, and thus in a manner assenting to the transaction, we do

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not think that that could have the effect of making that legal which in itself was not so. Parish officers have no right to require, either from the mother or the putative father of an illegitimate child, the deposit of a sum for its future support, or for the indemnity of the parish against the charge of maintaining it. Before the passing of the statute 18 *Eliz.* c. 3, no security whatever was required, and illegitimate children were frequently abandoned by their parents. That act empowers two magistrates to charge the mother or the putative father with the maintenance of the child; and, if the order made by them be not complied with, the parents may be committed to prison, there to remain until *security* be given to perform the order, or to abide by an order to be made at the then next Sessions of the Peace. By the 7 *Jac.* 1, c. 4, s. 7—after a recital that great charges arise in many places within the realm, by reason of bastardy—it is enacted, that every lewd woman who shall thereafter have any bastard *which may be chargeable to the parish*, may be committed by the Justices of Peace to the house of correction, there to be punished, and set to work for the term of one year. And by the 6 *Geo.* 2, c. 31, which was passed for the purpose of relieving parishes and other places from such charges as might arise from bastard children born within them, it is enacted (s. 1)—“That, after the passing of the act, if any single woman shall be delivered of a bastard child *which shall be chargeable, or likely to become chargeable*, to any parish, or extra-parochial place, or shall declare herself to be with child, and that such child is likely to be born a bastard, and to be chargeable to any parish, &c.; and shall, in either of such cases, in an examination to be taken in writing, upon oath, before any one or more Justice or Justices of the Peace of the county wherein such parish or place shall lie, charge any person with having gotten her with child, it shall and may be lawful for such Justice or Justices, upon applica-

tion made to him or them by the overseers of the poor of such parish, or by any one of them, or by any substantial house-holder of such extra-parochial place, to issue out his or their warrant or warrants for the immediate apprehending such person so charged as aforesaid, and for bringing him before such Justice or Justices, &c.; and the Justice or Justices before whom such person shall be brought, is and are thereby authorized and required to commit the person so charged as aforesaid, to the common gaol or house of correction for such county, &c., unless he shall give *security* to indemnify such parish or place, or shall enter into a recognizance, with sufficient surety, upon condition to appear at the next General Sessions of the Peace to be holden for such county, &c., and to abide and perform such order or orders as shall be made in pursuance of the 18th *Elisabeth*, c. 3, concerning bastards begotten and born out of lawful matrimony."

Thus, parish officers can only require security to indemnify the parish. The nature and amount of that security is in the discretion of the magistrates. Neither the overseers nor the magistrates are empowered to require the deposit or payment of a sum of money, unless to defray the expenses already incurred by the parish. It is true, that, in *Middleham v. Bellerby*, it was held that the putative father of an illegitimate child need not be taken before a magistrate, but may give a *voluntary* bond for the support of the child, until capable of providing for itself. It is not necessary for us to touch that decision. It has been expressly decided by the Court of *King's Bench*, that parochial officers cannot receive a specific sum in discharge of the future liability of the parents. One of the principles on which that decision is founded, is, that the payment of a large sum for the support of the child, gives the parish a degree of interest in the child's death, and might have a tendency to induce the officers to relax in their duty towards it. That objection will not apply

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in the present instance. It is not, however, the only or the most weighty objection that exists to allowing a departure from the mode of indemnity pointed out by the several statutes referred to. Cases may occur in which it would be desirable to avoid publicity, and in which there would be no objection to allow parish officers to take *security*, without the interference of a magistrate. But these securities must only be for the purpose of *indemnifying* the parish; the deposit of money in the hands of such persons is against the spirit of the laws, and is open to the greatest possible abuse. Such transactions would, necessarily, be conducted with secrecy. Thus, there would be no check upon the rapacity of the officers; and young persons, to avoid exposure, would submit to any terms, however extravagant, that they might think fit to impose upon them. It is impossible for the parish to know what their officers have received. The money might even be retained by them, and the parents afterwards called upon by the parish to defray those very expenses to meet which they had made the deposit. Besides, the deposit would be for an indefinite period—so long as there existed a possibility of the child's becoming chargeable. It might never return to the hands of the depositors.

We think that deposits of this kind are inconsistent with both the letter and the spirit of the statutes; and that the plaintiff in this case had clearly a right to repudiate the contract, which had, in a manner, been compulsorily wrung from her, and to recover back the sum deposited.

The rule for setting aside the nonsuit, and granting a new trial, must, therefore, be made—

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**BLEASBY and Others, Assignees of BYERS, a Bankrupt,
v. CROSSLEY and Others.**

*Monday,
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ON a former day in this Term, Mr. Serjeant *Wilde* obtained a rule nisi, that the verdict found for the plaintiffs, at the trial of this cause, before Lord Chief Justice *Best*, at the Sittings at *Guildhall*, after the last Term, might be set aside, and a nonsuit entered, or a new trial had.

The objection relied on was, the insufficiency of proof of the petitioning creditor's debt. With respect to this, it appeared, that *Smith*, the petitioning creditor, was one of the assignees, and was, consequently, in possession of all the papers of the bankrupt; and that the debt arose out of the loan by *Smith* to the bankrupt, of a check for 100*l.*, drawn by *Smith* on his bankers, Sir *Peter Pole & Co.*, and crossed by the bankrupt with the names of Messrs. *Sykes, Snaith, & Co.*, his bankers. The only evidence offered to shew the payment of the check, was, the fact of its being in the hands of the drawer; but no evidence was given of the manner in which it had got back into his hands. A clerk of Messrs. *Sykes, Snaith, & Co.* merely proved that 100*l.* were received by them from Sir *Peter Pole & Co.*, on account of the bankrupt, the day after the date of the check; and a clerk of Sir *Peter Pole & Co.* proved that a like sum was, on that day, paid by them on account of the petitioning creditor: but neither of these witnesses could identify the check.

To prove the payment of a check for 100*l.*, the loan of which constituted the petitioning creditor's debt, it was shewn, that the check was in the hands of the drawer; and that, on the day after the date of the check, his bankers had paid to the bankers of the bankrupt 100*l.* on his account. The petitioning creditor was one of the assignees of the bankrupt, and, in that character, had possession of all his papers:—*Held*, that, under these circumstances, the mere fact of his having this check, was not evidence of its payment.

Mr. Serjeant *Vaughan*, and Mr. Serjeant *Cross* shewed cause, and contended, that the fact of the check having found its way back to the hands of the drawer, was sufficient *prima facie* evidence of its having been paid in due course, and, consequently, established the petitioning creditor's debt; particularly as the amount was proved to have been received by Messrs. *Sykes, Snaith, & Co.*, from

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Sir *Peter Pole & Co.*, *Smith's* bankers, on account of the bankrupt, on the day after the date of the check.

Lord Chief Justice BEST.—This objection, though manifestly against the justice of the case, must, nevertheless, prevail; there being no evidence from which the Jury could legally presume the existence of the petitioning creditor's debt. The only proof to favour such a presumption, was, the possession of the check by the drawer; but, as it appeared that he, as assignee, had the possession of all the bankrupt's papers, the fact of the check being in his hands was not, alone, evidence of payment. There was no proof that the check had actually been in the hands of Messrs. *Sykes, Snaithe, & Co.*; neither was there any proof that this check had been paid to them by Sir *Peter Pole & Co.* In order to identify it, and make it evidence of the existence of the supposed debt, the clerk who paid it should have been called to prove the fact of payment.

The rest of the Court concurring—

Rule absolute, for a nonsuit.

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WILKINSON v. TATTERSAL.

The defendant obtained a rule to change the venue from *London* to *Lancashire*, on the usual affidavit. The affidavit of the plaintiff, on shewing cause, stated that the action was

brought on a contract for the purchase of cotton at *Trieste*, to be delivered at *Liverpool*. The Court discharged the rule.

ON a former day in this Term, Mr. Serjeant *Bosanquet*, on the part of the defendant, obtained a rule calling on the plaintiff to shew cause why the venue in this case should not be changed from *London* to *Lancashire*. The motion was founded upon an affidavit that the cause of action, if any, arose in the county of *Lancaster*, and not elsewhere

Mr. Serjeant *Taddy* shewed cause, upon an affidavit which stated, that the action was brought on a contract entered into by the defendant with the plaintiff, for the purchase of five hundred bags of *Egyptian* cotton, which were to be shipped at *Trieste* (out of the county of *Lancaster*) to be conveyed to, and delivered at, *Liverpool*; and that two of the plaintiff's witnesses resided in *London*; where he undertook to give material evidence. The learned Serjeant cited the cases of *Neale v. Neville*, and *Savory v. Spooner* (a), where this Court held, that the plaintiff may retain the *venue* where laid, on undertaking to give material evidence in any county, from which, if the *venue* had been laid there, the defendant could not truly make the usual affidavit to change it: and he contended, that the plaintiff's affidavit, and undertaking to give material evidence in *London*, were a sufficient answer to the rule; and that, where the cause of action arises, as in this case, in a foreign country, no undertaking even is necessary.

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 WILKINSON
 v.
 TATTERSAL.

Mr. Serjeant *Bosanquet*, in support of the rule.—In *Clarke v. Reed*, Mr. Justice *Heath* says (b): “The cause of action, and the right to bring the action, are two different things.” Here, the cause of action must be taken to have arisen in *Lancashire*, and not elsewhere in *England*, the contract being for the delivery of the cotton at *Liverpool*. If even part only of the contract or cause of action had its rise in *Lancashire*, the Court will not discharge this rule. In *Henshaw v. Rutley* (c), the Court refused to discharge a rule for changing the *venue* from *London* to *Kent*, upon an affidavit that the cause of action arose partly in *London* and partly in *Kent*; and that all the witnesses resided in *London*.

Cur. adv. vult.

Lord Chief Justice BEST.—The principal part of the

(a) 2 Marsh. 278; S. C. 6 Taunt. 565.

(b) 1 New Rep. 310.

(c) 1 New Rep. 110.

1826.
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 TATTERSAL.

contract in this case was, the shipping the goods at *Trieste* for *Liverpool*. The defendant's affidavit, that the cause of action arose in the county of *Lancaster*, and not *elsewhere*, is, therefore, incorrect. There has been much fluctuation in the decisions on this subject; but the cases of *Neale v. Neville* and *Savory v. Spooner*, seem to have set the point at rest. Lord Chief Justice *Gibbs* there laid down the following rule, *vis.* that the plaintiff must undertake to give material evidence in that county, from which, if the *venue* had been laid there, the defendant would not have been entitled to remove it. If, at the trial, he fail in this, he must be nonsuited.

The rule must, therefore, be—

Discharged.

IN THE EXCHEQUER CHAMBER.

Saturday,
 Jan. 28th.

POWELL and Others v. SONNETT and Others.
 [In Error.]

In *assumpsit*, a verdict was entered for the plaintiff on twelve counts of the declaration, and the Jury were discharged from finding any verdict on the other eight counts, the issues on which were immaterial. The Court, on error, refused to reverse the judgment, on the ground that it

THIS was an action of *assumpsit*. The declaration consisted of twenty counts.

The defendants below pleaded, to the whole declaration, the general issue; and, to the last eight counts, the statute of limitations, and also a set-off.

To the plea of the statute of limitations, the plaintiffs below replied, that they were beyond seas at the time the causes of action accrued; to the plea of set-off, they replied *nil debent*.

To the replication of the plaintiffs below, that they were

was not stated on the record, that the Jury were discharged with the consent of the parties.

beyond seas at the time the causes of action accrued, the defendants below rejoined, that they were not beyond seas; on which, as on the rest of the pleadings, issue was joined.

1826.
POWELL
v.
SONNETT.

At the trial, a verdict was found for the plaintiffs below—damages 24,000*l.*, on the twelve first counts, and for the defendants below upon the remaining eight: on the issue on the replication of *ultra mare*, the verdict was for the plaintiffs below; and on the issue on the plea of set-off, the Jury were discharged.

The defendants below brought a writ of error. The error assigned was, that it was not stated on the record that the Jury had been discharged on the issue arising out of the plea of set-off to the last eight counts of the declaration, with the consent of the parties.

Mr. *Patteson*, for the plaintiffs in error.—The Judge had no authority to discharge the Jury. They could only be discharged by the consent of the parties, and their consent must appear on the record.

Mr. *Broderick*, for the defendants in error.—The verdict having been found for the plaintiffs below on the general issue, the issues upon the plea of set-off, applying to the same causes of action, became wholly immaterial, and the Jury would be discharged by operation of law. In *Cossey v. Diggon*s (a), where an avowry stated that the defendant held the premises at a certain yearly rent, to wit, the yearly rent of 72*l.*, and the plaintiff pleaded—*first, non tenuit*—and *secondly, riens in arrear*; and the first plea was found for the plaintiff—it was held, that the second plea became thereby immaterial, and that the proper course was, to discharge the Jury from finding any verdict upon it; but that, if any verdict was entered upon it, it must be entered for the plaintiff.

(a) 2 Barn. & Ald. 546.

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v.
SONNETT.

The Court proposed to the counsel for the defendants in error, that they should amend the record. This they, however, declined.

Lord Chief Justice BEST.—We entertain no doubt; but, as the sum recovered is very large, we were anxious that the record might be amended, in order that there might be no pretext for carrying the case further. As it does not appear that any bill of exceptions was tendered at the trial, or any motion since made, either for a new trial, or in arrest of judgment, we must presume that all that the record states to have been done, was done rightly. The judgment of the Court below must be—

Affirmed.

REGULA GENERALIS.

IT IS ORDERED—That all prisoners who have been or shall be in custody of the Warden of his Majesty's prison of the Fleet, for the space of six months after they are supersedeable, although not superseded, shall be from time to time discharged out of the custody of the said Warden, by the said Warden, as to all such actions in which they have been or shall be supersedeable; and that no prisoner shall be entitled to any room in the said prison by reason of seniority, except from the time of his being charged in execution in the actions in which he is not supersedeable.

W. D. BEST.
J. A. PARK.
J. BURROUGH.
S. GASELEE."

END OF HILARY TERM.

CASES
ARGUED AND DETERMINED
IN THE
Courts of Common Pleas
AND
Exchequer Chamber,
IN EASTER TERM,

IN THE SEVENTH YEAR OF THE REIGN OF GEORGE IV.

—♦—

RIDPATH *v.* MARY WILLIAMS.

*Wednesday,
April 12th.*

A RULE was obtained by Mr. Serjeant *Wilde*, in the last Term, calling on the plaintiff to shew cause why the appearance entered for the defendant, under the statute 12 *Geo.* 1, c. 29, and the interlocutory judgment signed against her, in this cause, should not be set aside for irregularity, with costs. The affidavits on which he moved, stated, that the defendant had never been personally served with any copy of process at the suit of the plaintiff, and had never authorized an attorney, or any other person, to receive a copy of such process, or cause an appearance to be entered for her.

The defendant wilfully avoiding the service of process, the plaintiff sent it to her by the post, inclosed in a letter, which she refused to receive. He entered an appearance for her, and afterwards signed judgment.—The Court set aside the judgment, without costs.

Mr. Serjeant *Peake* now shewed cause, on an affidavit of the plaintiff's attorney, which stated, that he had given to the sister of the defendant a copy of a writ of *cap. ad resp.*, sued out of this Court at the instance of the plaintiff; that she informed the deponent that he could not see the defendant, as she was unwell; that the deponent called

1826.

RIDPATH
v.
WILLIAMS.

several times at the defendant's house, in order to serve such copy on her, but was told that the defendant was ill, and that she would not see him; that, on the 22nd *November* last, the deponent put a letter into the post-office at *Bath*, containing a true copy of the writ, addressed to the defendant at her residence; that, on the following morning, he found, on inquiring at the office, that the letter was not taken in at the defendant's house; and that it was returned to the deponent, on payment of the postage, marked "refused." The postman also made affidavit that he offered the letter at the house, but that the servant refused to take it in, saying that her mistress had ordered her not to do so.

The learned Serjeant referred to the case of *Aldred v. Hicks* (a), where the plaintiff's attorney, having had a communication by letter with the defendant respecting the subject of the action, sent him process in a letter, by the general post, and also a declaration, and notice of declaration, in the same manner, and, in due course, entered an appearance for him, and signed judgment for want of a plea—the Court held the service of the process to be good, although the defendant had never read the letter. He contended, that, on the authority of that case, the transmission of the process by the post might, under the circumstances, be deemed equivalent to service.

Per Curiam.—The statute 12 *Geo.* 1, and the practice of the Court, require a personal service of process. If the defendant avoided service, a summons should have been left, and the plaintiff should have proceeded, according to the old course, by *distringas*, to compel her appearance. The case of *Aldred v. Hicks* is distinguishable from this, as there, though the defendant did not actually open the letters, there was sufficient reason to believe that he knew

(a) 5 Taunt. 186; S. C. 1 Marsh. 8.

the hand-writing of the attorney on the direction, and divined the contents, and therefore it was a wilful refusal to receive the process, which the defendant might have seen if he would, and was a contempt of the process of the Court, of which they thought that he ought not to be permitted to avail himself.

Inasmuch, however, as they thought that the plaintiff in this case might have been misled by the case of *Aldred v. Hicks*, the Court ordered that the rule should be made—

Absolute, without costs.

1826.

RIDPATH
v.
WILLIAMS.

BECKWITH v. CORRALL and Another.

Wednesday,
April 12th.

THIS was an action of trover, to recover the value of a bill of exchange for 332*l.*, which had been stolen from the plaintiff.

At the trial, before Lord Chief Justice *Best*, at the Sitings at *Guildhall* after last *Hilary* Term, it appeared, that, on the 23rd of *December* last, the plaintiff had been robbed of his pocket-book, containing the bill in question, which was dated the 21st *November*, 1825, drawn by a banking-firm at *Canterbury*, upon Messrs. *Remington & Co.*, bankers, *Lombard Street*, payable, thirty days after sight, to the order of Mr. *H. Meredith*, accepted by *Remington & Co.*, and indorsed by *Meredith* to the plaintiff; that, on the 26th *December*, the plaintiff advertised the loss of his pocket-book, making no mention of the bill, but merely stating, that “the contents of the pocket-book

The plaintiff was robbed of a pocket-book containing, amongst other things, a bill of exchange. In advertising the loss, he merely stated that the pocket-book contained “papers of no use to any person but the owner.” The bill was, shortly afterwards, presented at the banking-house of the defendants, by a stranger, who stated that he was the son of the indorser. The defendants discounted it.

In trover, the Judge left it to the Jury to say—*first*, whether they thought that the plaintiff had done all that his duty required of him, in advertising and making known his loss—*secondly*, whether, if due diligence had been used by the plaintiff in this respect, the defendants had acted *bond fide*, and used due caution, in receiving the bill: telling them, that, if they were of opinion that the plaintiff had failed in giving proper notice of the robbery, the defendants were entitled to a verdict. The Jury having found for the defendants—The Court refused to disturb the verdict, holding the direction proper.

1826.
—
BECKWITH
v.
CORRALL.

were of no use to any person but the owner," and offering a trifling reward for its restoration; and that, on the 30th, notice of the robbery was given to *Remington & Co.*, and they were requested to stop the bill.

The defendants were bankers at *Maidstone*. The bill was presented at their bank, on the 29th of *December*, by a young man who was unknown to them, but who said that *Meredith* (the payee and indorser) was his father. The amount of the bill was thereupon paid to him in notes of the defendants' bank.

His Lordship left it to the Jury to say—*first*, whether they thought that the plaintiff had done all that his duty required of him, in advertising and making known his loss; *secondly*, whether, if due diligence had been used by the plaintiff in this respect, the defendants had acted *bona fide*, and used due caution, in receiving the bill: telling them, that, if they were of opinion that the plaintiff had failed in giving proper notice of the robbery, the defendants were entitled to a verdict.

The Jury found for the defendant.

Mr. Serjeant *Wilde* now moved for a rule *nisi*, that this verdict might be set aside, and a new trial had, on the ground of mis-direction. He submitted that the question, whether the plaintiff had used due diligence in advertising his loss, was improperly left to the Jury; as the right of the defendants to retain the bill would depend, not upon the degree of diligence or negligence observed by the plaintiff, but upon the fact of their own conduct, in receiving it, being marked by the exercise or the want of that degree of caution and prudent care which they were bound to observe, in a transaction of this nature, with one who was a perfect stranger to them (a); that the only ques-

(a) See *Snow and Others v. Peacock and Others*, ante, 236.

tion that should have been left for their consideration was, whether the defendants had received the bill *bond fide*, and in the exercise of due diligence; that, if a want of caution were apparent in the conduct of the defendants, it was immaterial whether or not notice had been given by the plaintiff; and that, in this case, there was evidently an extreme want of caution in the defendants' conduct, in abstaining from making any inquiry of the person who presented the bill to them.

1826.
 BECKWITH
 v.
 CORRALL.

Per Curiam.—If, in this case, the plaintiff had used due diligence, and had given proper notice of the loss of the bill in question, the defendants might have been presumed to have been apprised of that fact. Where a person loses, whether by accident or robbery, a negotiable security, he should, before he can be entitled to recover it in an action of this nature, be prepared to shew that he has done all that could be required on his part, to make known his loss, and that the party who has received it, has, in doing so, failed in observing due caution. The defendants in this case received the bill *bond fide*; there is nothing to shew that they received it improperly, or to fix them with a knowledge of the loss of it by the plaintiff. The only notice the latter gave of his loss, was, an advertisement, which would rather have the effect of misleading the world, than of giving the requisite information; for, it only stated, that the pocket-book contained papers of no use to any person but the owner. The plaintiff, therefore, had failed to use proper diligence in making known his loss. He should have described the bill properly in his advertisement, and thus have put people on their guard.

Rule refused.

1826.

Thursday,
April 13th.

ROWLES, Demandant; LAWRENCE, Tenant.

A writ of entry was returnable, and an appearance entered thereon, in *Michaelmas* Term. The count was intituled of *Hilary* Term, and was delivered on the 10th *February*. The Court set aside the count, for irregularity, and refused to allow it to be amended.

THIS was a writ of entry. A rule was, in the course of the last term, obtained by Mr. Serjeant *Bosanquet*, on the part of the tenant, calling on the demandant to shew cause why the count delivered by him in this cause should not be set aside, for irregularity, on an affidavit which stated, that the tenant was summoned to appear on the original writ of entry, in *Michaelmas* Term last; that an appearance was duly entered in that term; and that the demandant's count was not delivered to the tenant until the 10th of *February* last, when it was intituled of *Hilary* Term, and indorsed with notice to plead thereto in eight days. The learned Serjeant submitted, that the count was wrongly intituled, as it should have been intituled as of the term in which the writ was returnable, and the appearance entered, *viz.* *Michaelmas* Term.

Mr. Serjeant *Taddy* and Mr. Serjeant *Wilde* now shewed cause.—Declarations are frequently intituled as of the term when they are delivered. The intitling them at all is mere matter of form; for, when the record is made up, it is intituled of the term when issue is joined. In *Williams's Saunders*, it is said (a), that, both in this Court and in the *King's Bench*, the record is intituled of the term in which the issue, whether of law or fact, is joined, without regarding the term of which the declaration and plea, &c., may be. The title of the declaration, therefore, is of no consequence. Although, in *Topping v. Fuge* (b), it was held, that, if a declaration be not intituled of the term in which the writ is returnable, or the appearance entered, it is an irregularity; yet that case is distinguishable from

(a) 2 Wms. Saund. 1 b, n (1). (b) 5 Taunt. 771; S. C. 1 Marsh. 341.

the present, the declaration there being intitled neither of the term in which the writ was returnable, nor of that wherein it was delivered; but of an intermediate term. Even if the count is irregularly intitled, the irregularity is no ground for setting it aside. In *Stork v. Herbert* (a), the Court held, that this was not such an irregularity as they would permit the defendant to take advantage of, so far as to set aside the proceedings, but would permit it to be amended: and in *Wilkes v. The Earl of Halifax* (b), the Court said, that the title of the declaration should be altered according to the truth, and that fiction in law should never do injustice, for, *in fictione juris semper est æquitas*. Here, there will be no error or irregularity on the roll, but only on the face of the copy of the count delivered to the tenant. If, indeed, it be an irregularity, it is so slight a one that the tenant ought not to be allowed to take advantage of it. Besides, the tenant has waived the objection, by serving the demandant with a summons for an imparlance.

1826.

ROWLES,
Demandant;
LAWRENCE,
Tenant.

Per Curiam.—The summons for an imparlance is no waiver of the irregularity. It is not necessary for us to reason on the practice adopted by the Courts on this point. The case of *Topping v. Fuge* is decisive to shew that a declaration must be intitled of the term in which the writ is returnable, or the appearance entered. In *Smith v. Muller* (c), too, it was held, that, when the cause of action will admit of it, the declaration must be intitled of the term wherein the writ is returnable; and that, although it may be filed or delivered, yet it cannot regularly be intitled, of a subsequent term. If this were a personal action, the Court might allow the declaration to be amended; but, this being a real action, in which the Court will not allow amendments, except under very particular cir-

(a) 1 Wils. 242.

(b) 2 Wils. 256.

(c) 3 Term Rep. 624.

1826.

ROWLES,
Demandant;
LAWRENCE,
Tenant.

cumstances (*a*), and there being nothing in this case to induce us to depart from the strict rule, the amendment cannot be allowed.

Rule absolute.

(*a*) See the case of *Tooth*, demandant; *Bagwell*, tenant; *ante*, p. 236; *S. C.* 3 Bing. 373. See also the note, *ante*, p. 240, and the cases there referred to.

Thursday,
April 13th.

ODDIE, Demandant; FOSTER, Tenant; Earl of PLYMOUTH,
Vouchee.

The Court refused to allow a recovery to be amended by the insertion in the *præcipe*, of the description of the parcels intended to pass, which had been omitted by mistake.

MR. Serjeant *Bosanquet* moved to amend this recovery, by the insertion of the description of certain premises in the *præcipe* at the head of the warrant of attorney, which had been omitted by mistake. The affidavit on which the motion was founded, stated, that the error was a mere clerical error, and that the description of the premises in the *præcipe* was intended to correspond with that in the deed to lead the uses.

But the Court said, that they were disposed rather to narrow than to enlarge the rules adopted as to allowing amendments in fines and recoveries; that, to allow the amendment prayed in this case, would be going considerably further than the Court had ever before gone in such cases; that it was the duty of the Court to watch narrowly, so as not to prejudice those in remainder; and that the amendment required here was so extensive—the supplying the omission, not of a word or two only, but of four lines, being the whole description of the parcels in the *præcipe*, that they could not allow it, but must leave the parties to suffer another recovery.

Refused.

1826.

CHARRINGTON and Another, Assignees of SAMWELL, a
Bankrupt, v. BROWN and Another.

Friday,
April 14th.

THIS was an action of trover by the plaintiffs, assignees of the estate and effects of one *Samwell*, a bankrupt, to recover the value of certain property of the bankrupt, which had been taken under an execution by the defendants, the Sheriff of *Middlesex*.

At the trial, before Lord Chief Justice *Best*, at the Sitings at *Westminster*, after the last Term, the following facts were given in evidence, for the purpose of establishing the act of bankruptcy:—

The bankrupt was a publican at *Hoxton*. A creditor called upon him, by appointment, on the 4th *July* last, for payment of a debt of 4*l.*, and saw the bankrupt, who immediately left the room. The creditor waited about half an hour, but the bankrupt did not return. His wife, whom the creditor met in the passage, said that the bankrupt had gone out. The bankrupt was at this time in extreme distress.

His Lordship left it to the Jury, upon these facts, to say, whether or not the bankrupt left his house with intent to avoid or delay a creditor. The Jury thought he did so, and accordingly found a verdict for the plaintiffs—damages 256*l.*, the value of the goods seized.

Mr. Serjeant *Vaughan* now moved for a rule *nisi*, that this verdict might be set aside, and a new trial had. He submitted that there was no evidence of an act of bankruptcy; that the answer given by the wife of the bankrupt to the creditor, that he was gone out, was not *per se* sufficient to shew that he had gone out for the purpose of avoiding his creditor; but that, for any thing that appeared to the contrary, he might have gone out for the purpose of procuring money to satisfy the demand.

A creditor called upon the bankrupt, by appointment. The bankrupt left the room, and did not return, and his wife told the creditor that he had gone out:—*Held*, that this was sufficient evidence to warrant the Jury in inferring that the bankrupt left his house with intent to avoid a creditor.

1826.
 CHARRINGTON
 v.
 BROWN.

Per Curiam.—The creditor called at the house of the bankrupt, by appointment. The latter absented himself. Under these circumstances, it was properly left to the Jury to say, whether or not the bankrupt had left his home to avoid or delay a creditor. If he had merely gone to another part of the house with that intent, that would have been an act of bankruptcy. The answer of the wife was part of the *res gesta*.

Rule refused (a).

(a) See *Gimingham v. Laing*, 2 Marsh, 236; S. C. 6 Taunt. 532; *Bigg v. Spooner*, 2 Esp. 651.

Friday,
 April 14th.
 The defendant employed the plaintiff, an attorney, to conduct a suit for his son. On the trial of that cause, the attorney called the defendant as a witness, and, lest he should be objected to as incompetent, by reason of interest, he prepared a release:—*Held*, that the conduct of the plaintiff was a fraud upon the Court, and that he was not entitled to recover.

WILLIAMS, Gent., One &c., v. GOODWIN the Elder.

THIS was an action of *assumpsit*, for an attorney's bill. At the trial, before Lord Chief Justice *Best*, at the Sittings at *Westminster*, after the last Term, it appeared that the costs in question were incurred in the carrying on of an action brought by the son of the defendant, for a malicious prosecution; that the plaintiff was employed by the present defendant to conduct that suit; and that, on the trial of that cause, the defendant was called as a witness on behalf of his son; upon which occasion the plaintiff in this action (the attorney) prepared a release of the father (the present defendant), in case his competency should be questioned.

His Lordship, under these circumstances, thought that the plaintiff, having imposed upon the Court, was not entitled to recover; and he therefore directed a nonsuit.

Mr. Serjeant *Vaughan* now moved for a rule *nisi*, that this nonsuit might be set aside, and a verdict entered for the plaintiff.

Lord Chief Justice *BEST*.—The plaintiff, an officer of the Court, has grossly imposed upon it. He was employ-

ed to conduct the suit in respect of which these costs were incurred, and in that cause he examined this defendant as a witness, when, unless released from liability to the costs, he would not have been a competent witness. Apprehensive of the objection being taken, the attorney prepared a release, which would have been given to the witness if required; and he now brings his action. He has been guilty of a fraud upon the Court, and he cannot be allowed to recover, as he does not come into Court with clean hands.

1826.
 WILLIAMS
 v.
 GOODWIN.

Mr. Justice PARK.—It is highly desirable that the sources of justice should be kept pure. This plaintiff cannot be allowed to profit by his misconduct. He knew that, if objected to, the present defendant would not be a competent witness in the action brought by his son, he himself being liable for the costs, and thus interested in the event of the suit. He therefore prepared a release. It is right that the plaintiff should be put in the same situation as he would have been in had the release been used. I think the nonsuit right.

The rest of the Court concurring—

Rule refused.

BIRCHAM v. CHAMBERS Senr., a Prisoner.

Saturday,
 April 15th.

THE defendant being brought up, under a writ of *habeas corpus*, for the purpose of being charged in execution—

Bail cannot justify for a defendant brought into Court to be charged in execution in the cause.

Mr. Serjeant *Bosanquet*, moved to justify bail.

Mr. Serjeant *Onslow*, on behalf of the plaintiff, opposed the motion, on the ground that the defendant was *now in Court*, for the purpose of being charged in execution in this cause.

1826.

BIRCHAM
v.
CHAMBERS.

Mr. Serjeant *Bosanquet* contended, that, the defendant not being at the moment *actually charged* in execution, the bail might justify.

Sed, per tot. Cur.—There being in law no fraction of a day, the defendant must be considered virtually to stand charged in execution, he being brought into Court for that purpose.

Refused.

Saturday,
April 15th.

BRYANT v. LOXTON.

In slander, the declaration stated, that the plaintiff was an auctioneer and appraiser, that the defendant had employed him as an appraiser to value certain goods, and that he spoke of him, and his conduct as to such valuation—"He is a damned rascal; he has cheated me out of 100l. on the valuation:"—*Held*, sufficient after verdict.

THIS was an action for slander. The declaration contained ten counts. The *first* count, in substance, stated—That the plaintiff exercised the calling or business of an auctioneer and appraiser, and that the defendant, before the committing the grievances thereafter mentioned, had agreed to dispose of certain goods, chattels, and effects, to one *Moon*; that the defendant had thereupon retained and employed the plaintiff, as an appraiser, to value such goods on his behalf; and that the plaintiff had conducted himself with fairness, honesty, and integrity, in such valuation: but that the defendant, intending to injure him in his calling or business of an auctioneer, spoke of him, the plaintiff, and his conduct as to such valuation, the words following, viz. "He (meaning the plaintiff) is a damned rascal; he has cheated me (meaning the defendant) out of 100l. on the valuation."

At the trial, before Mr. Justice *Gaselee*, at the last Assizes at *Taunton*, the defendant was proved to have used the words imputed to him. The learned Judge left it to the Jury to say, whether, from the nature of the words spoken, they thought that the defendant meant to impute dishonesty to the plaintiff; and whether or not the words had been deliberately spoken. He desired them to negative the special damage alleged in the declaration, it not

being supported by the evidence. The Jury returned a verdict for the plaintiff—damages 40*s*.

1826.

BRYANT
v.
LOXTON.

Mr. Serjeant *D'Oyley* moved for a rule *nisi*, that this verdict might be set aside, and a nonsuit entered; or that the judgment might be arrested. He submitted, that the words proved were not in themselves actionable; but could only become so by their being shewn to have been spoken of the plaintiff in the way of his business; that they were not shewn to have been so spoken, as the plaintiff was not proved to be an appraiser, otherwise than by shewing that he, as a broker, acted in the valuation of the defendant's goods to *Moon*; which, he contended, was not sufficient.

As to the arrest of judgment, he argued that the words, as laid in the declaration, had reference only to the valuation, and were not stated to have relation to the plaintiff in the way of his trade. He referred to the case of *Smedly v. Heath* (a), where it was held, that the words "cheating knave, and rogue," spoken of a mercer, were not actionable, the *colloquium* having reference only to the plaintiff himself, and not to his trade; and *Terry v. Hooper* (b), where the words "cheating knave," spoken of a lime-burner, were held to be actionable, if spoken with reference to his business; but, it seems that they would not have been so, if spoken of himself only. The learned Serjeant submitted, that, as there was no averment in the declaration, that the valuation was made by the plaintiff in the ordinary way of his trade or calling, the record did not disclose sufficient to entitle the plaintiff to maintain the action.

Lord Chief Justice BEST.—There is no ground for either of these objections. I am decidedly of opinion that, even if there were no *colloquium* in the declaration, to shew that the words alleged to have been spoken, were spoken

(a) 1 Lev. 250.

(b) 1 Lev. 115.

1826.

BRYANT
v.
LOXTON.

of the plaintiff in the way of his trade, the present action might be maintained; inasmuch as it is alleged, that the words were spoken with intent to injure the plaintiff in his calling or business of an auctioneer and appraiser, and it was found that they were spoken with that intent. Even if there had been no other allegation in the declaration, than that the words were spoken with an intent to injure the plaintiff in his trade, and it was proved that they were likely to do so, and so found by the Jury, the action might be maintained. The *first* count of the declaration contains a sufficient *colloquium* to connect the slander with the trade of the plaintiff. It states, that, before the time of committing the grievances, the plaintiff exercised the calling or business of an auctioneer and appraiser; and that he had been retained and employed by the defendant, as an appraiser, to value certain goods. Whether that would be sufficient on special demurrer, is another question; it is clearly sufficient after verdict. The meaning conveyed by the words, "He has cheated me out of 100% on the valuation," is evident. Their effect was, to injure the plaintiff in his business of an appraiser, by alleging that he had, in that character, conducted himself dishonestly. They were spoken of the plaintiff, with reference to his valuation of the defendant's goods; and that valuation was evidently made in the ordinary exercise of the plaintiff's trade or calling. Thus, the slander was directly pointed at the plaintiff in the way of his trade; it was calculated to injure him in it; and was uttered with that intent. The count, therefore, is sufficient after verdict.

Mr. Justice PARK concurred.

Mr. Justice BURROUGH.—It was proved at the trial, that the words were spoken of the plaintiff in the way of his trade; and therefore the judgment cannot be arrested. That which must necessarily be implied, need not be ex-

pressly alleged on the face of the record. There could be no doubt as to the trade of the plaintiff.

Mr. Justice GASELEE.—I have twice examined the record, and I have no doubt as to the propriety of the verdict. The plaintiff must, however, confine it to particular counts—to those alleging the words to have been spoken to *Moon*.

Rule refused.

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BRYANT
v.
LOXTON.

DOE *d.* SMYTHE *v.* CLAXTON.

Saturday,
April 15th.

THIS was an action of ejectment. At the trial, before Mr. Justice *Burrough*, at the last Assizes at *Exeter*, a deed, purporting to be a deed made between the lessor of the plaintiff and the defendant, was offered in evidence. The attesting witness, who was called to prove the execution of the deed by the defendant, stated that the attestation at the foot of the deed was in his hand-writing; that he knew the defendant; that he did not know whether the signature to the deed was in the defendant's hand-writing or not; but that he (the witness) would not have put his name to it unless he had seen it executed by him.

The attesting witness to a deed stated, that he knew the defendant, one of the parties, that the attestation was in his (the witness's) hand-writing, that he did not know whether or not the signature to the deed was the defendant's hand-writing, but that he would not have put his name to it unless he had seen him execute it:—*Held*, sufficient proof of the execution.

The learned Judge was of opinion that the proof of the execution of the deed by the defendant was sufficient. The Jury returned a verdict for the lessor of the plaintiff.

Mr. Serjeant *Wilde* now moved for a rule *nisi*, that this verdict might be set aside, and a nonsuit entered. He submitted, that, as the hand-writing of the defendant to the deed was not identified by the witness, and as he was ignorant of the contents of the instrument, and therefore could not state with certainty that the deed in question was that attested by him, there was no sufficient proof of its execution by the defendant.

1826.

DOR
d.
SMYTHE
v.
CLAXTON.

Per Curiam.—The attesting witness stated that he knew the defendant, by whom the deed was executed; and, though he said that he did not know whether the signature of the deed was in the hand-writing of the defendant or not, still, as he said that he would not have put his name to it unless he had seen the defendant execute it, we think the execution proved.

Rule refused.



Saturday,
April 15th.

ISAACS v. SILVER.

The defendant was held to bail on a bill of exchange. The Court refused to order the bail-bond to be delivered up to be cancelled, on an affidavit that the bill was founded and given on an usurious transaction.

THE defendant in this cause having been arrested at the suit of the indorsee of a bill of exchange, of which he, the defendant, was the indorser, and having given a bail-bond—

Mr. Serjeant *Lawes* moved for a rule *nisi*, that the bail-bond might be delivered up to be cancelled, on the defendant's entering a common appearance, on an affidavit which stated that the bill was founded and given on an usurious transaction. The learned Serjeant cited the case of *Wightwick v. Banks* (a), where the Court of *Exchequer* held, that, if there be probable ground to suspect that the securities on which a defendant is held to bail are illegal, it is a ground for discharging him, on filing common bail.

Per Curiam.—The Court cannot receive an affidavit in contradiction to that filed by the plaintiff on the issuing of the writ. The case of *Wightwick v. Banks* cannot be supported.

Rule refused.

(a) *Forrest*, 153.

1826.

Monday,
April 17th.

TOOTH, Demandant; BAGWELL, Tenant.

THIS was a trial at bar of a writ of right. The grand assize having been sworn, and the *demimark* tendered—

On the trial of a writ of right, the tenant must begin, notwithstanding the tender of the *demimark*.

Mr. Serjeant *Vaughan*, for the tenant, submitted that it was for the demandant to begin, by shewing the seisin of his ancestor. He referred to the cases of *Hardman v. Clegg* (a), *Throgmorton v. Broker* (b), and *Tyssen v. Clarke* (c); in which latter case, he observed, it did not appear that the *demimark* had been tendered.

Mr. Justice *Burrough* referred to the case of *Luke v. Harris* (d), where the *demimark* was tendered, and yet it was held that the tenant must begin.

Mr. Justice *Gaselee* mentioned a case of *Dalton v. Harvey* (e), where the case of *Luke v. Harris* was cited and acted upon.

Per tot. Cur.—The practice having been once settled, we are bound to act upon it. The tenant must begin.

The tenant then commenced, and proved an uninterrupted possession of the premises for more than forty years. The demandant failed in deducing a title.

Verdict for the tenant.

(a) Holt's N. P. C. 657.

(d) 2 Sir W. Blac. 1261, 1293.

(b) Booth on Real Actions, 98.

(e) Tried at *Dorchester*.

(c) 3 Wils. 541.

1826.

Tuesday,
April 18th.

DE BERGARECHE v. PILLIN.

In a declaration against the drawer, on a bill of exchange accepted payable at a banker's generally, it is only necessary to aver a presentment at that place.

THIS was an action of *assumpsit*, by the indorsee against the drawer of a bill of exchange.

The declaration stated—That the defendant, according to the custom of merchants, made his certain bill of exchange in writing, and directed it to one *W. A. South*, by which he requested him, two months after the date thereof, to pay to the plaintiff, or order, *239l.*, value received; which said bill of exchange the said *W. A. South*, upon sight thereof, accepted, according to the said usage and custom of merchants, payable at Messrs. *Sikes, Snaith, & Co.'s*. It was then averred—That, when the bill became due and payable, according to the tenor and effect thereof, it was duly presented and shewn to and at the said Messrs. *Sikes, Snaith, & Co.'s*, for payment thereof, according to the said usage and custom of merchants, and that payment thereof was then and there required, according to the tenor and effect of the said bill of exchange, and of the said *W. A. South's* said acceptance thereof; but that the said Messrs. *Sikes, Snaith, & Co.* did not nor would, at the said time when the said bill of exchange was so presented and shewn to them for payment thereof, neither did the said *W. A. South*, pay the said sum of money therein specified, nor any part thereof, but wholly refused and neglected so to do; of all which premises the defendant afterwards had notice: by means whereof, he became liable to pay the plaintiff the sum in the bill specified, when he (the defendant) should be thereto afterwards requested.

To this declaration, the defendant demurred specially, assigning for causes—"That the bill was accepted by the said *W. A. South*, payable at and by the said Messrs. *Sikes, Snaith, & Co.*, and that it is not expressed, nor does it appear, in the declaration that the words 'not elsewhere' are contained in the acceptance, or any other

words denoting that the said *W. A. South* could not pay the bill elsewhere than at the said Messrs. *Sikes, Snaith, & Co.'s*, whereby, and by force of the statute in that case lately made and provided, the acceptance of the said bill was general and not special; and that due presentment to the said *W. A. South* of such bill, when due and payable, ought to have been alleged; whereas, no presentment of the said bill to the said *W. A. South* is alleged; and also that no due presentment of the said bill is alleged in the declaration."

The plaintiff joined in demurrer.

Mr. Serjeant *Spankie*, in support of the demurrer.— Since the passing of the statute 1 & 2 Geo. 4, c. 78 (a), an acceptance like this is a general acceptance, and, as against the acceptor, there need be no averment or proof of presentment at the place mentioned; but, as against the drawer and indorsers, the case is different; they are only secondarily liable, that is, on the default of the acceptor; consequently, that default should be shewn. The case is not at all affected by the statute. This is a general acceptance, and therefore presentment should have been made to the acceptor. The declaration, to charge the drawer, should have contained an averment of present-

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(a) By s. 1 of which, it is enacted—"That, from and after the 1st August, 1821, if any person shall accept a bill of exchange payable at the house of a banker, or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill; but, if the acceptor shall, in his acceptance, express that he accepts the bill, payable at a banker's house, or other place,

only, and *not otherwise or elsewhere*, such acceptance shall be deemed and taken to be, to all intents and purposes, a qualified acceptance of such bill; and the acceptor shall not be liable to pay the said bill, except in default of payment, when such payment shall have been first duly demanded at such banker's house, or other place."

And see the case of *Rowe v. Young*, 2 Brod. & Bing. 165.

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ment to *the acceptor*, and not to *Sikes, Snaith, & Co.*, to whom they were not bound to present it at all. Although the bill was made payable at *Sikes, Snaith, & Co.'s*, the acceptor was not bound to be there to pay it. That would not, however, dispense with the necessity of the holder's seeking him elsewhere. At all events, he should have averred some excuse for not presenting it to the acceptor: that the acceptor was not there to pay the bill, or that he could not be found. The record discloses no default on the part of the principal, the acceptor so as to make third parties, *vis.* the drawer, or an indorser, who are mere sureties, liable to pay the bill.

Mr. Serjeant *Taddy*, *contra*, was stopped by the Court.

Lord Chief Justice BEST.—The statute 1 & 2 *Geo. 4*, c. 78, s. 1, enacts, that, if any person shall accept a bill of exchange, payable at the house of a banker, or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill. Thus, the statute declares an acceptance similar to that which appears in the present case, to be a *general* acceptance, and dispenses with the necessity of a presentment, or averment of presentment, at the place where the bill is made payable; but, though the Legislature has declared that the holder *may*, it does not require that he *shall*, present the bill so accepted, to the acceptor, personally, and not at the place pointed out by the acceptor himself. Independently of the act, which, it has been admitted, is out of the question, it is clear, that, if a bill be made payable at a particular place, the holder is only required to present it there. It has been contended that it should have been averred in the declaration, that the *acceptor* was called upon, at *Sikes, Snaith, & Co.'s*, to pay the bill, and was not there to pay it, or was not to be found: but

that would be absurd; the holder could not expect to find the acceptor himself at the bankers', but only the money. The acceptor constituted Messrs. *Sikes, Snaithe, & Co.* his agents to pay the bill. They were authorized to pay it. I, therefore, think that the averments, that the bill was accepted, payable at Messrs. *Sikes, Snaithe, & Co.'s*, and that it was duly presented *there* for payment, and refused, were sufficient to entitle the plaintiff to recover.

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Mr. Justice PARK.—According to the construction contended for, it would be necessary for the acceptor of every bill that is made payable at a banker's, to be there himself to pay it. The averment that the bill "was duly presented and shewn to and at the said Messrs. *Sikes, Snaithe, & Co.'s*, for payment thereof," and that they refused payment, was quite sufficient.

Mr. Justice BURROUGH.—By virtue of the statute, the acceptance in question was a general acceptance; and a presentment to the acceptor personally would have been a good presentment to charge the other parties on the bill. But, though the statute declares such an acceptance to be a general acceptance, it does not necessarily follow that the presentment must be to the acceptor in person. In the present case, the acceptor has dispensed with the necessity of a presentment to himself, by pointing out his bankers' as the place of payment.

Mr. Justice GASELLE concurred.

Judgment for the plaintiff.

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Tuesday,
April 18th.

JARVIS v. DEAN.

In an action on the case for an injury resulting to the plaintiff from falling down an unprotected area, the declaration stated, that the defendant was possessed of the premises, and that they were adjoining "a certain common and public street and highway." It appeared that the defendant had agreed with the owner of the premises (two carcasses of houses) to finish one of them, for doing which he was to have the other; and that workmen employed by him were then actually at work upon them; but it did not appear that any conveyance had been made to him. The street in question, which had been forming for six years, and lead from a public street to a new road across fields, over which the way had been publicly used for five or six years, was unfinished, one half only being lighted, the other neither lighted nor paved: but the inhabitants had paid the highway and paving rates:—*Held*, that this was sufficient evidence to go to a Jury of a possession in the defendant, and of a dedication of the street to the public.

THIS was an action on the case for an injury resulting to the plaintiff from the negligence of the defendant.

The declaration stated, that the defendant was possessed of a certain messuage or dwelling-house in the parish of *St. Mary, Islington*, adjoining a certain street called *Barnsby Row*, which said street at that time was, and still is, a common and public street and highway, for all the liege subjects of our lord the king to go, return, pass, and repass, on foot, every year, and at all times of the year, at their free will and pleasure; and that the defendant wrongfully and negligently left the area of the said house uncovered and open, whereby the plaintiff, on passing at night, fell in and was injured, and was put to expense in effecting his cure.

The defendant pleaded the general issue.

At the trial, before Lord Chief Justice *Best*, at *Westminster*, at the Sittings in term, it appeared that the area in question belonged to one of two unfinished houses in *Barnsby Row*; that this row was intended to form one side of a new street leading from *White Conduit Street* to a road passing over some fields to *Highgate*, which for five or six years had been used as a public road; that this street had been building for the last six years; that some of the houses were finished, others not; that one half of it only was lighted, the other being neither lighted nor paved; but that the inhabitants had paid highway and paving rates. It was also proved, that, some time before the accident happened, the proprietor of the houses in question had treated with the defendant for the fitting of them up; and evidence was offered to shew that the defendant was

to have one house for completing the other; and that workmen employed by him were then actually at work upon them: but it did not appear that any conveyance had been made to him.

It was objected, on the part of the defendant, that there was no evidence of possession by him, or of a dedication of the street to the public, to support the allegations in the declaration, that the defendant was possessed of the house, and that the street in which the house was situate was a common and public street and highway.

His Lordship left it to the Jury to say, whether or not the right of possession was in the defendant; and told them, that, if, they thought that the street in question had been for a long period used as a public thoroughfare, with the assent of the proprietors, they might presume a dedication.

The Jury accordingly returned a verdict for the plaintiff—damages 50*l*.

Mr. Serjeant *Vaughan* now moved for a rule *nisi*, that this verdict might be set aside, and a new trial had, on the grounds—*First*, that there was no evidence that the defendant was possessed of the house, as alleged in the declaration;—*Secondly*, that it did not appear at the trial, that the house adjoined a common and *public* street, part of the street only being lighted, the other neither lighted nor paved; nor was there a sufficient dedication of it to the public to constitute it a highway.

First—The whole extent of the evidence offered, was, that the defendant was to have one of the houses for finishing the other. The conveyance, therefore, would not be made until the work was completed; and the completion was a condition precedent to the possession.

Secondly—There was no evidence of a dedication of the soil of the street in question to the public. In *Roberts v.*

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Karr (a) Mr. Justice *Heath* held, that a dedication to the public must be made openly and with a deliberate purpose; nor could there be a partial dedication to the public, although there might be a grant of a foot-way only. The case of *The Rugby Charity v. Merryweather* (b) was cited and commented upon in the case of *Woodyer v. Hadden* (c). There, the plaintiff made a street leading out of a highway, across his own close, and terminating at the edge of the defendant's adjoining close, which had been separated, by the defendant's fence, from the end of the street, for twenty-one years, during nineteen of which the houses were completed, and the street publicly watched, cleansed, and lighted, and both foot-ways and half the horse-way thereof paved at the expense of the inhabitants—it was held that this was not a street dedicated to the public. Mr. Justice *Gibbs* said (d): “There can be no doubt that, if a man had erected a rail at the extremity of his land against the land of another, he might thereby restrain others from passing; if he had drawn a thread there, it would have done; why it should be necessary to put a rail or any thing there at all, is what I cannot understand. But I do not go on that ground; let it be remembered that here the paving is not completed. In all the cases where it has been held that there has been a dedication of a way to the public, there has been a considerable space of time of *user* as a material ingredient. In one of the most leading cases, that of *The Foundling Hospital* (e), Lord *Kenyon* treats that as a very material ingredient; there he thinks eight years is a sufficient time to presume that dereliction; he says in one case six years were held sufficient; and, though the same time is not necessary to dedicate a highway as is required to establish a right of possession to land against an hostile claim, yet time is an

(a) 1 Campb. 262, n.

(b) 11 East, 376, n.

(c) 5 Taunt. 125.

(d) 5 Taunt. 135.

(e) 11 East, 375, n.

ingredient. Now, in this case, I think there is not time enough to presume a dedication. The foot-pavement was finished; the horse-way was not completely finished; there had been a negotiation for opening it, and that had gone off. The owners of the land had a right to say that this should not be used as a common highway, but only as an occupation way." Mr. Justice *Heath* said (a): "I am of opinion that there is no evidence here of a dedication. No act is necessary, on the part of the owner of land, while his work is unfinished, to evince, that, under these circumstances, he does not dedicate his property to the public. We know, that, in dedicating churches and church-yards, and, antiently, temples, there is, after the work is completed, a formal act of dedication. I think here, by analogy, that, not only until the work is completed, but until the owner has shewn some intention of dedicating the soil to the public, his right continues of putting up a bar and excluding them; otherwise, the building of every house and laying out a way to it, would establish a public way. *Affectus tuus nomen imponit operi tuo*. No fact in this case shews that the owners meant to give the public any right over this land, beyond a right of passage to the respective houses. The right given is only a right to each house; and as to the idle people going there, that ought to make no difference at all. *Hawkins* says (b) 'A way to a parish church, or to the common fields of a town, or to a private house, or perhaps to a village, and which terminates there, and is for the benefit of the particular inhabitants of such parish, house, or village only, may be called a private way, but not a highway; because it belongeth not to all the king's subjects, but only to some particular persons, and each of which, as it seems, may have an action on the case for a nuisance therein.' The authorities he cites are exactly in point. Is, then, a *Nisi Prius* de-

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(a) 5 Taunt. 140.

(b) Hawk. P. C. Book 1, c. 76, s. 1.

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cision (a), to overturn the antient established law of the land? I can easily account for acquiescence in that decision; each party was trying it at his own expense, and neither could benefit by it." Sir *James Mansfield* said (b): "I think, to support any thing like a dedication, it must be finished as a perfect street. Now, this was not such. A witness proved, that, though the foot-way on each side was complete to the end, the horse-way was paved only half the way. I think that a street cannot be held to be finished, unless paved. Certainly it would not be very convenient. I therefore think this street never was dedicated to the public; and I do not know that, if it were a public street perfected, it is therefore a public way for all purposes. No one can respect Lord *Kenyon* more than I do, but I always thought, as to the *Rugby* case, there was reason to doubt that. I never could discover when the dedication began: he says, that, during the lease, there was no dedication, but that eight years' acquiescence afterwards were sufficient: he says, that, in another case, six years were held to be enough, not naming the case. If six, why not one? Why not half a year?" That case is a sufficient authority to shew, that, to constitute a common and public highway, the dedication to the public must be express and unequivocal. There was no evidence of any such dedication in the present case.

Lord Chief Justice BEST.—I am of opinion that this verdict ought not to be disturbed. There was abundant proof, at the trial, of an acquiescence by the inhabitants that the street in question was a public street or highway. It was paved and lighted with gas, at least in part; and the occupiers of houses therein were rated for the paving and lighting. The way was not used by the inhabitants of the street only; it was a public thoroughfare. It ap-

(a) The case of *The Rugby Charity*, cited *ante*, 356. (b) 5 Taunt. 142.

peared that the defendant and all the other owners of property in the street laid by for a period of six years, and saw the public continually passing and repassing, without interruption, from road to road. The Jury were, therefore, well warranted in finding a dedication to the public. When the public are thus invited to go along a street, if, through the carelessness and negligence of the proprietors or occupiers of houses therein, an accident happens to an individual passing, the parties cannot afterwards turn round and say, that it was not a public road. With respect to the objection as to the proof of the allegation of possession in the defendant at the time of the injury complained of, I told the Jury, that, whether there was any instrument in writing or not, the question for their consideration was, whether or not the defendant was in fact in possession: and, although it was not proved that possession had been formally delivered to him, or that he was to have the one house until the work of the other was completed, yet it appeared that his workmen were actually employed upon the premises at the time. The defendant was, therefore, clearly responsible; and I think the Jury have come to a right conclusion.

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Mr. Justice PARK.—I think this case was properly left to the Jury, and that they have given a right verdict. The evidence as to the defendant's possession of the premises was quite sufficient. Dedications to the public of rights of way may either be partial or entire. Here, I think there was sufficient evidence of an entire dedication of the way: the street was open at both ends, and was paved and lighted at the expense of the parish.

Mr. Justice BURROUGH concurred.

Mr. Justice GASELER.—The evidence in this case disclosed all the *indicia* of an unqualified dedication of the way in question to the use of the public; and the defend-

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ant was guilty of gross negligence. I am, therefore, of opinion that the verdict ought not to be disturbed.

Rule refused (a).

(a) See *The King v. Lloyd*, 1 Camp. 260; *Wood v. Veal*, 5 Barn. & Ald. 454.

Friday,
April 21st

Partners may join in an action for slander, or for a libel spoken or published of them in the way of their trade: and *semble* that, in such case, the declaration need not aver special damage.

FORSTER and Others v. LAWSON.

THIS was an action for a libel. The *first* count of the declaration stated—That the plaintiffs, before, and at the time of the composing, printing, and publishing, of the several false, scandalous, malicious, and defamatory libels thereafter respectively mentioned, by the defendant, of and concerning the plaintiffs, were, and from thence hitherto have been, and still are, bankers, and the trade and business of bankers have, for and during all that time, used, exercised, followed, and carried on, in partnership together, at *Cambridge*, in the county of *Cambridge*, to wit, at *London*, and the plaintiffs, for and during all the time aforesaid, have been and still are in good and solvent circumstances, and have never stopped payment, nor, until the time of printing and publishing the libels thereafter mentioned, been suspected to be in bad and insolvent circumstances, or to have stopped payment; but, until that time, were always in good credit: by means of which said several premises, the plaintiffs, before the printing and publishing of the said libels, had acquired, and were then daily acquiring, sundry great gains and profits in and from their said trade and business, to wit, at &c. aforesaid: yet the defendant, well knowing the premises, but contriving and wickedly and maliciously intending to injure the plaintiffs in their aforesaid trade and business, and to cause it to be suspected and believed, by and amongst their neighbours, and other good and wor-

thy subjects of this realm, that the plaintiffs were in bad and insolvent circumstances, and that the plaintiffs, as such bankers as aforesaid, had stopped payment; and thereby and otherwise to injure the plaintiffs in their aforesaid trade and business, and to vex, harass, oppress, impoverish, and wholly ruin them; theretofore, to wit, on &c., at &c. aforesaid, falsely and maliciously composed, printed, and published, and caused and procured to be composed, printed, and published, in a certain public newspaper called "*The Times*," a certain false, scandalous, malicious, and defamatory libel, of and concerning the said plaintiffs in their said trade and business; in which said libel there were and are contained the false, scandalous, malicious, defamatory, and libellous, words and matter following, of and concerning the plaintiffs in their said trade and business: that is to say—"But, though the accounts from some parts of the country, respecting the renewal of confidence in the local banks, are favourable, yet the list of failures of such establishments, intelligence of which reached town yesterday, is of fearful extent. The following are the names of some of the sufferers: The *Hinckley* Bank of *Sansome & Co.*, the Bank of *Jervis & Co.*, of the same place, being the only establishments in that town; *Southampton* Bank of *Kellow & Co.*; the *Peterborough* Bank of *Simpson & White*; the *Wisbeach* Bank of *James Hill & Son*; the *Kingston (Surrey)* Bank, the only one in the town. At *Cambridge*, it is said that four out of the six banks in that town have stopped payment, *viz.* that of *Thomas Fisher & Son*; that of *J. Mortlock, Esq. & Sons*; that of *Horlock & Co.*; and that of *R., E., and R. Forsters*, (meaning the said plaintiffs in their said trade and business). The letters from *Cambridge* state, that the graduates and heads of colleges, so far from adding to the alarm on this occasion, as is said to have been recently the case among the members of another learned body, interfered in the most prompt manner, and tendered their assistance, in a very large sum, provided that, by such means, the

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evil could be averted; but the assistance was declined, because there was no prospect of its proving effectual." And in another part of the said libel, after the aforesaid matters, were also contained the other false, scandalous, defamatory, and libellous matter following, of and concerning (amongst others) the plaintiffs in their said trade and business; that is to say—"Since writing the above, we understand that an express has arrived from *Cambridge*, with information that the whole of the banks in that place (meaning, amongst others, the said plaintiffs in their said trade and business) have suspended their payments; the partners of the respective firms having met together, and mutually adopted a resolution to that effect; but, intimating amongst their friends a hope that the suspension would only be temporary."

There were three other counts, in which different parts of the libel were set out; the whole concluding with the following averment of special damage:—

"By means of the printing and publishing of which said several false, scandalous, malicious, and defamatory libels, by the defendant, of and concerning the plaintiffs in their said trade and business, as aforesaid, the plaintiffs not only have been and are greatly injured in their said trade and business, and have been and are suspected and believed to be insolvent, and to have stopped payment; but also, by means and in consequence of the printing and publishing of the said several libels, divers, to wit, ten thousand promissory notes, made by the plaintiffs in the way of their said trade and business, for the payment by the plaintiffs of divers sums of money, amounting in the whole to a large sum, to wit, the sum of twenty thousand pounds, which, before and at the time of the printing and publishing the said several libels, were outstanding and in circulation, and which, but for the printing and publishing of the said several libels, would have remained and continued outstanding and in circulation, were presented to

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the plaintiffs for payment thereof, and the plaintiffs were called upon, and forced and obliged to, and did, necessarily, pay and satisfy to the respective holders of such notes the several sums of money in such notes respectively specified; whereby the plaintiffs not only lost and were deprived of all the benefit and advantage which might, and otherwise would, have arisen and accrued to them from the said notes remaining and continuing outstanding and in circulation, but were put to great trouble and expense of their monies, to wit, an expense of two thousand pounds, and suffered and sustained a great loss, to wit, a loss of two thousand pounds, in and about the raising and procuring sufficient money to pay and satisfy the said several notes: and thereby and otherwise, by means of the premises, the plaintiffs have been and are greatly injured and damnified, to wit, at &c. aforesaid.

To this declaration the defendant demurred generally.

The plaintiffs joined in demurrer.

Mr. Serjeant *Taddy*, in support of the demurrer.— This declaration cannot be supported. It alleges, by way of inducement, that the plaintiffs, before and at the time of the publication of the libel, were bankers, in partnership together, at *Cambridge*, and that they were in good and solvent circumstances, and had never stopped payment. The libel does not impute insolvency to the plaintiffs; it merely states that they had suspended their payments: closing that assertion with the expression of a hope that the suspension would only be temporary.

The special damage stated in the declaration, is not sufficient to sustain the action. Where three persons join in an action of *tort*, they must shew a joint interest, and a joint damage sustained by all. *Cook v. Batchelor* (a) is the only case in which it has been held that partners

(a) 3 Bos. & Pul. 150.

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may join in an action for defamatory words spoken of them respecting their trade. There, a joint fraud was imputed to the plaintiffs, and there was evidence of a joint damage. That case, therefore, if it can be supported, is not applicable to the circumstances of the present. In *Smith v. Cooker* (a), which was an action on the case for saying of the plaintiffs—"You and your wife are both witches, and have bewitched my mare;" on motion in arrest of judgment, the Court said that the words ought to be referred as they were spoken, *viz.* that both of them had bewitched the mare; and that both refers to each of them, that they had severally committed the offence. To support a joint action by two or more plaintiffs, the act done by the defendant must be such as to operate a joint injury. Was the injury that these plaintiffs have sustained by the publication of the alleged libel, a joint injury? It clearly was not. The injury to each was separate, as they were severally interested in the concerns of the partnership. A recovery by the plaintiffs in the present action, could not be pleaded by the defendant, in bar to a separate action that might hereafter be brought by one of these plaintiffs for the same libel. If there was any joint injury, it was an injury to the fund, rather than to the persons of the plaintiffs; and their interests in that fund might be of different degrees—their various proportions of the capital might differ; in which case, all would not sustain the like degree of damage. In a note by Mr. Serjeant *Williams*, to the case of *Coryton v. Lithebye* (b), treating of those who may join or be joined in the same action, the learned Serjeant says, that, "regularly, where two or more are jointly interested, or have a joint interest, they may join in the same action; but, that, if a man says to two persons, 'You have murdered J. S.,' or imputes to them any other slander, they cannot join in one action against him for speaking

(a) Cro. Car. 512.

(b) 2 Wms. Saund. 116, n.

these words; but each of them must bring a separate action; for, the wrong done to one, is no wrong done to the other."

Besides, there is no sufficient allegation of special damage; there is no averment that the plaintiffs' notes were payable on demand, or that they were due and payable at the time of the publication of the libel complained of. The plaintiffs have merely alleged, that they "were called upon, and forced and obliged to, and did, necessarily, pay and satisfy to the respective holders of such notes, the several sums of money in such notes respectively specified." They should have gone further; they should have stated how they incurred a legal obligation to pay. It was incumbent on them to state specifically the nature of the special damage which they had sustained.

Mr. Serjeant *Wilde*, *contra*, was stopped by the Court.

Lord Chief Justice BEST.—This is an action for a libel on the plaintiffs in their trade. The declaration states that the plaintiffs were bankers at *Cambridge*, in partnership together, and that they were in good and solvent circumstances, and had never stopped payment; nor, until the time of publishing the libel, been suspected to be in insolvent circumstances, or to have stopped payment; but, that, until that time, they were in good credit. The libel is then set out; and the plaintiffs allege, by way of special damage, that, by the publication of the libel, they have not only been greatly injured in their trade, and been suspected to have been insolvent, and to have stopped payment; but also, that ten thousand promissory notes made by them in the way of their trade, for the payment of 20,000*l.*, which, before the publishing of the libel, were outstanding and in circulation, and which, but for its publication, would have remained outstanding and in circulation, were presented to the plaintiffs for payment; and that they were obliged to pay the respective holders of

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such notes the several sums in the notes specified; whereby they not only lost all the benefit and advantage which would have accrued to them from the notes continuing outstanding and in circulation, but were put to the expense of 2,000*l.*, in raising and procuring sufficient money to pay and satisfy the said notes.

To this declaration the defendant has demurred generally; and, in support of the demurrer, three objections have been urged—*First*, that the libel is not in itself actionable.—*Secondly*, that two or more parties cannot properly join in an action for slander or for a libel—*Thirdly*, that the special damage is not alleged with sufficient certainty in the declaration. I am of opinion that there is no foundation for either of these objections.

To say of a banker, that he has stopped payment, is clearly libellous. The obvious meaning of such an assertion is, that he is unable to fulfil his obligations to the public; which would clearly be an injury to his trade as a banker, and actionable, without any averment of special damage.

Although it may be true, as a general proposition, that an action for slander, or for a libel, cannot be maintained by two or more persons jointly; yet there are, undoubtedly, exceptions to that rule. *Cook v. Batchelor*, and several other cases, both previous and subsequent, show that the present action may be maintained. We should act directly in contradiction to the rule laid down in that case, and since invariably acted upon, if we held otherwise. The case of *Smith v. Cooker* recognizes the general principle, that two persons cannot maintain a joint action for slander; as, for imputing to them the crime of murder, there being no joint interest to be injured; for, the wrong done by the slander to one, is no wrong to the other; but the injury to each would be different, according to circumstances. If, however, two or more persons have a joint interest, and the words spoken, or the libel written, be injurious to that interest, the case of *Cook v. Batchelor*, as

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well as the previous authorities, shew that that injury may be the subject of a joint action. All the cases upon this subject are collected by Mr. Serjeant *Williams*, in a very learned note to the case of *Coryton v. Lithebye*, to which we have been referred. It is there said, that two or more partners may join in an action of slander, for words spoken of them in the way of their trade, whereby they have sustained special damage; and that two joint-tenants or coparceners may join in an action of slander of title: and reference is made, as to the form of the action, to a precedent in *Brownlow* (a). The old forms of pleading are evidence of what the law is. In the late case, *Barratt and Another v. Collins* (b), which was an action for maliciously holding the plaintiffs to bail, we held the action to be maintainable, the Jury having in their verdict, confined the damages to the expenses which the plaintiffs were jointly put to in procuring their liberty. When the interest to be affected by the slander or the libel, is joint, the action may be maintained jointly. It has been said, that, if the plaintiffs recover against the defendant in this action, each of them may afterwards bring a separate action, against which the recovery in this would be no bar. If the plaintiffs had been severally injured, no doubt they might severally sue in respect of that injury; but, where the injury is common to all, a recovery in a joint action would unquestionably be a bar to any separate action. It has also been contended that the plaintiffs may not each have the like degree of interest in the partnership fund. That, however, could not be known to the defendant.

The objection that the special damage is not alleged with sufficient certainty in the declaration, if a valid objection, could only have been taken on special demurrer. But I think that the special damage is sufficiently alleged. It

(a) See *Brownl. Rediv.* 91.

(b) 10 B. Moore, 447.

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is averred, that, at the time of the publication of the libel, the plaintiffs' notes were outstanding and in circulation, and that they were forced and obliged to pay them, and thus lost the benefit of their circulation, and were put to expense in procuring money to pay them. How they were called upon to pay, it is not material to shew.

Upon the whole, I am of opinion that there should be judgment for the plaintiffs.

Mr. Justice PARK.—I entirely concur in the judgment of my Lord Chief Justice. Where slanderous words are spoken or written of partners in the way of their trade, a joint action may clearly be maintained. The case of *Cook v. Batchelor* is unimpeached. Older authorities have established the same principle. The allegation, that, by means of the libel, the plaintiffs were called upon and forced and obliged to pay the outstanding notes, was a sufficient allegation of special damage; and a most grievous damage to commercial men. It is unnecessary to say whether or not a recovery in this action might be pleaded in bar to a separate action, for the *same* injury, by one of the present plaintiffs; but, if three have sustained a joint damage, and one a separate independent injury, I do not say that a separate action might not be maintainable.

Mr. Justice BURROUGH.—This very point has been decided more than once. I am of opinion that the action is maintainable. The declaration states, that the plaintiffs are partners trading together. We cannot look to the precise degree of interest which each partner has in the partnership fund. Special damage is never set out otherwise than as it is in this declaration. There is sufficient to shew that the firm is injured. This case is not to be distinguished from *Cook v. Batchelor*. I perfectly agree with my Lord Chief Justice, that, even without any averment of special damage, this action would be maintainable.

The libel was an attack upon the plaintiffs' trade, and undoubtedly was calculated to operate a serious injury. Whether the injury was inflicted upon a single individual or upon two, three, or more persons, makes no difference in point of law.

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Mr. Justice GASELEE.—Every line of the publication in question is slanderous. It makes no distinction, in my opinion, whether the libel is directed against an individual trader, or against a firm consisting of many members. The plaintiffs were entitled to recover, without any averment of special damage.

Judgment for the plaintiffs.

HORNBY, Administratrix, &c., v. BOWLING.

Friday,
April 21st.

MR. Serjeant *Spankie* had, on a former day in this term, obtained, on the part of the defendant, a rule *nisi* to set aside the writ of trespass *quare clausum fregit*, and the subsequent proceedings thereon, for irregularity, and to restore the several sums of 40s. and 4l. 2s. 6d., the issues which had been levied under two several writs of *distringas* issued against the defendant whilst abroad and out of the jurisdiction of the Court; and that the plaintiff might pay the costs of the application. He had moved this upon an affidavit which stated, that the defendant departed this country on the 31st *October* last, and then resided in *Ireland*.

A plaintiff may proceed by *distringas* to compel the appearance of a defendant who resides abroad, but carries on trade in this country.

Mr. Serjeant *Wilde* now shewed cause, on an affidavit which stated, that, in the last *Trinity* vacation, the defendant, who resided in *Kent Street*, and carried on trade under the firm of *Bowling & Co.*, was applied to by the plaintiff's attorney for the settlement of an account between the defendant and the plaintiff's late husband; that,

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on the 2nd *September* last, the defendant, by letter, requested such attorney to call on him at his residence in *Kent Street*; that, no arrangement having been made, and the defendant having refused to settle the account, the sum of 290*l.* having been ascertained and acknowledged by him to be due to the plaintiff's late husband, an original writ of trespass *quare clausum fregit* was issued out of this Court against the defendant, in the last *Michaelmas* vacation, which was duly served by the officer of the Sheriff of *Surrey*; but that, no appearance having been entered thereto, a writ of *distringas* was issued against the defendant on the 11th *February* last, and 40*s.* levied for the defendant's non-appearance thereto, which sum was in the possession of the Sheriff of *Surrey*; that, on the 6th *April* last, a second writ of *distringas* was issued, under which the Sheriff had levied the further sum of 80*s.*; and that the defendant, at the time this action was commenced, and then, continued to carry on the business of a druggist, at *Kent Street*, under the name and style of *Bowling, Walker, & Co.*

The learned Serjeant submitted, that, in order to entitle the defendant to sustain this motion, it was necessary for him to shew that he was completely out of the jurisdiction of the Court, and that he did not mean to return to this country, and had not any place of trade here, or any business carrying on for his benefit. He referred to the case of *Gurney v. Hardenbergh* (a), where it was held, that a plaintiff who did not know, at the time of giving credit, that the defendant was out of the realm, might proceed, notwithstanding his absence, to compel an appearance by *distringas*: so, also, if the defendant, residing abroad, carried on trade in this country—Sir *James Mansfield* saying, “What is the creditor to do, if he cannot use this process? The defendant carries on trade in this country, although

(a) 1 Taunt. 487.

he is absent; and the persons who supply the materials for his trade, and by means of which he makes his profit, cannot, without this method, obtain payment for a single article. We must either say, there can be no process against any man who is out of the realm, or sanction it in the present instance:" and Mr. Justice *Heath*—"If the defendant carries on trade in *England*, it is the same thing as if he were resident here." And he contended, that, as the statutes 51 *Geo. 3*, c. 124, and 57 *Geo. 3*, c. 101, were no longer in existence, and thus the affidavit required by those acts no longer necessary, personal service could not be required; and that, therefore, the issues were, under the authority of the case of *Gurney v. Hardenbergh*, properly levied.

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Per Curiam.—It appears to us that the case of *Gurney v. Hardenbergh* governs this. That was the last decision that occurred before the passing of the statute 51 *Geo. 3*, c. 124, and it seems to be founded on principle. The affidavit of personal service was only required by that statute, which was continued by the 57 *Geo. 3*, c. 101; but, both those acts having expired, it is no longer necessary.

Rule discharged (a).

(a) See the statute 7 & 8 *Geo. 4*, c. 71, s. 5, which regulates the existing practice as to the *distringas*, and by which it is enacted—"That, in case it shall be made appear to the satisfaction of the Court, or, in the vacation, of any Judge of the Court from which original process shall issue, or in to which the same shall be returnable, that the defendant could not be personally served with the summons or attachment, and that such

process had been duly executed at the dwelling-house or place of abode of such defendant, that then it shall be lawful for the plaintiff, by leave of the Court, or order of such Judge, as aforesaid, to sue out a writ of *distringas*, to compel the appearance of such defendant."

Under this clause, the Court, in the case of *Turner v. Smith* (1 Moore & Payne, 557), allowed a writ of *distringas* to be sued out,

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on an affidavit of the Sheriff's officer, that he could not serve the defendant personally at his house, that he believed he kept out of the way to avoid being served, and that his son told him he had left home for that purpose.

The Court will always require a positive affidavit, shewing that due diligence has been used in attempting to serve the defendant, and that it is through his default alone that the service cannot be

made. A mere affidavit that an attorney's clerk had called several times at the defendant's house, for the purpose of serving him, but that he could not find him, and that it was verily believed that he kept out of the way to avoid being served, has been held insufficient. The affidavit must shew a reasonable *cause* for the belief of the deponent that the service is purposefully evaded.

Saturday,
April 22nd.

The Mayor, Bailiffs, and Burgesses of BERWICK-upon-TWEED v. SHANKS.

Covenant by the assignee of the lessee of a term, is a local action; the *venue* must be laid in the county where the lands are situate.

The town and liberties of *Berwick-upon-Tweed*, are not for any purpose within or part of the county of *Northumberland*

THIS was an action of covenant, by the lessors against the assignee of the lessee of a term in certain premises situate within the liberties of *Berwick-upon-Tweed*. The declaration commenced as follows:—

“ *Northumberland* (to wit). *George Shanks*, the elder, was summoned to answer the mayor, bailiffs, and burgesses, of the borough of *Berwick-upon-Tweed*, of a plea that he keep with them the covenant made by *James Baird*, for himself and his assigns, with the said mayor, bailiffs, and burgesses; and thereupon the said mayor, &c., by their attorney, complain—For that whereas, heretofore, to wit, on the 1st *June*, 1801, at *Morpeth*, in the county of *Northumberland*, by a certain indenture then and there made between the said mayor, &c., on the one part, and the said *James Baird*, one *James Bell*, and one *Anthony Foster*, since deceased, on the other part (which said indenture, sealed with the seal of the said *James Baird*, the said mayor, &c., now bring here into Court, the date whereof is the day and year aforesaid), the said mayor, &c., for the considerations therein mentioned, did demise, set, lease,

and to farm let, unto the said *James Baird*, his executors, administrators, and assigns, all that messuage, tenement, or farm-hold, and lands thereto belonging, containing twenty-four acres, or thereabouts, situate *within the liberties of Berwick-upon-Tweed* aforesaid, being Lot No. 24, of the outfields belonging to the said mayor, &c., together with all and singular the houses, &c., and appurtenances whatsoever to the said premises belonging, or in any wise appertaining, or therewith held and enjoyed: to have and to hold the messuage, tenement, or farm-hold, and lands thereto belonging, and all and singular other the premises thereby demised, unto the said *James Baird*, his executors, administrators, and assigns, from the 29th *September* next ensuing the date of the indenture, for and during and unto the full end and term of twenty-one years from thence next ensuing, and fully to be complete and ended; yielding and paying therefore, yearly and every year, during the said term, unto the said mayor, &c., their successors or assigns, or to their treasurer for the time being, or to the several and respective burgesses and widows of burgesses, who should, from time to time, during the said term thereby letten, have shares in the said farm-hold, in equal proportions, the yearly rent or sum of 5*l.*, on the 25th day of *March* in every year, during the said term; the first yearly payment to begin and be made at or upon the 25th *March* next after the commencement of that demise."

The declaration then set out covenants by *James Baird* with the mayor, &c., not to assign the demised premises without licence, and to keep them in repair to the end of the term: "By virtue of which indenture, the said *James Baird* entered into the said demised premises, with the appurtenances, and became and was possessed thereof, for the said term so to him thereof granted as aforesaid."

It was then averred—"That, after the making of the indenture, and during the said term thereby granted, to wit, on &c., all the estate, right, title, interest, and term

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of years then to come and unexpired, of the said *James Baird*, of, in, and to the said demised premises, by assignment thereof, by and with the licence and consent of the said plaintiffs, legally came to and vested in the defendant; whereupon he entered into and upon all and singular the demised premises, and became and was thereof possessed, and so continued, from thence until the determination of the said demise."

Breach—That the defendant, as such assignee, suffered the premises to be out of repair, and so left them at the end of the term.

To this declaration, the defendant demurred generally.

The plaintiffs joined in demurrer.

The case came on for argument on a former day in this Term.

Mr. Serjeant *Wilde*, in support of the demurrer.—This being an action by the lessors against the assignee of the lessee of a term in premises which are described in the declaration as being situate within the liberties of *Berwick-upon-Tweed*, the *venue* is improperly laid in the county of *Northumberland*; the action being in its nature local, the *venue* should have been laid where the cause of action arose, viz. at *Berwick*. Although, when the town of *Berwick-upon-Tweed* was made part of this country, it ceased to belong to *Scotland*, yet it did not thereby become attached to the county of *Northumberland*. It is not suggested that the liberties of *Berwick-upon-Tweed* are in *Northumberland*.

Mr. Serjeant *Peake*, *contra*.—There is no filacer for *Berwick*. It is doubtful whether, if the *venue* were laid there, the action could be maintained in the Courts at *Westminster*; at all events, if the *venue* may be laid in *Berwick*, the cause must be tried in *Northumberland*.

In *The King v. Cowle* (a), Lord Mansfield said, that a *venue* does not run to *Berwick*, and that causes of action arising within that borough must be tried in *Northumberland*. In the case of *Barker v. Damer* (b), the Court agreed that covenant would lie, as well in the county where the demise was made, as in that where the lands demised lay. In *The Bailiffs of Litchfield v. Slater* (c), it was held, that it is no objection, after verdict, that an action of covenant for not repairing, &c., was brought and tried in a foreign county; the defect being cured by the statute of *jeofails*, 16 & 17 Car. 2, c. 8. In that case, the defendant pleaded, that the premises were situate in the city of *Litchfield* and county of the same city; and the cause was tried in the county of *Stafford*. It was moved in arrest of judgment, that the cause ought to have been tried in the county of the city of *Litchfield*; and Lord Chief Justice Willes said: "If it, had stood on the declaration only, this objection would not have arisen; for, the premises there were only said to lie in *the city of Litchfield*; and, though we are to take notice judicially of counties, we cannot judicially take notice of the boundaries of counties, nor that the whole city of *Litchfield* lies within the county of the city." In *The Mayor of London v. Cole* (d), the *venue* was laid in *London*, and the premises were stated in the declaration to be in the parish of *St. Luke*, in the county of *Middlesex*. It was moved in arrest of judgment, that the action, being local, should have been tried in *Middlesex*. Lord Kenyon said: "It does not clearly appear that the land lies in the county of *Middlesex*, as it was described as *heretofore* part of a field in the parish of *St. Luke*, in the county of *Middlesex*; but, for any thing that appears on the face of this record, this field may have changed its

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(a) 2 Burr. 855.

(b) Carth. 182.

(c) Willes, 431.

(d) 7 Term Rep. 583.

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jurisdiction." In the present instance, it does not appear on the face of the declaration, that the premises in question are out of the county of *Northumberland*; neither is it stated that they are within or part of the town of *Berwick-upon-Tweed*, but merely that they are within the *liberties* of *Berwick*. The general demurrer does not negative the premises being in the county where the *venue* is laid; and, as there is only a general demurrer, it is not incumbent on the plaintiffs to shew that the premises are situate in the county where the action is brought; but the *onus* of proving that they are not within that county, rests upon the defendant. The Court will not assist so unjust an objection.

Mr. Serjeant *Wilde*, in reply.—It has been said, on the other side, that this is an objection that the Court will not be disposed to assist; but the Court will, I apprehend, be far less disposed to depart from the established and wholesome rules of practice. Where the cause of action arises in the town of *Berwick-upon-Tweed*, the proper course is, to enter a suggestion on the record. The form of the entry is to be found in *Tidd* (a). This is not a question as to boundaries. The premises are expressly alleged to be within the liberties of *Berwick*. In the case of *The Mayor of London v. Cole*, the defect was aided after verdict by the statute of *jeofails*. *Barker v. Damer* is decisive to shew, that, in an action of this nature, the *venue* is local. In *The Bailiffs of Litchfield v. Slater*, the objection was too late, being after verdict. There is no case to be found wherein it has been held that this objection may not successfully be urged before verdict. The allegation that these premises are situate within the liberties of the town of *Berwick*, sufficiently negatives their being in the county of *Northumberland*. The *liberties* of *Berwick* must un-

(a) *Prac. Forms*, 9th Edit. p. 250.

questionably be taken to be part of the *town of Berwick*; as the liberties of the City of *London* form part of that city, and are entitled to all its privileges, and subject to all its municipal regulations.

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Cur. ade. vult.

Lord Chief Justice BEST now delivered the judgment of the Court.—

After stating the declaration, his Lordship proceeded as follows:—It has been objected in this case, that the action is in its nature local, and therefore that the cause should have been tried where the land was situate. We are of opinion that this is a local action. Where the cause of action arises from a privity of estate, and not on a privity of contract only, it is clearly local. The question, then, is, does it appear on the face of this declaration, that the action is brought in the wrong county? I confess I had for some time a doubt whether it did or not; but, on looking into the case of *The King v. Cowle*, and the statute 1 & 2 Jac. 1, c. 28, we think it does so appear. *Berwick* originally formed part of *Scotland*. It is now a part of *England*. It is not necessary to mention either the town of *Berwick-upon-Tweed*, or the principality of *Wales*, in acts of Parliament, in order to extend their provisions to those places. The town of *Berwick* sends members to the *British* Parliament. But, though *Berwick* is within the kingdom of *England*, it does not therefore follow that it is in the county of *Northumberland*. By their charter, the corporation of *Berwick* have power to hold Courts for the trial of all actions and demands, both real and personal, arising within the town, and the liberties and precincts thereof; they have also the returning of all writs issuing out of the Courts at *Westminster*, into the town of *Berwick*. The Sheriff of *Northumberland* has no jurisdiction whatever within the borough. He is expressly excluded by the charter. This charter has been confirmed by the Legislature, and we are, therefore, bound to take

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judicial notice of it. The case of *The Bailiffs of Litchfield v. Slater* is materially distinguishable from the present. There, Lord Chief Justice *Willes* said, that he could not judicially take notice that the city of *Litchfield* was co-extensive with the county of the city: but, here, as, by the charter by which the town of *Berwick* is incorporated, it appears that the Sheriff of *Northumberland* is expressly denied all authority within that town, or the liberties or precincts thereof, we are bound to take judicial notice that the liberties of the town of *Berwick* are not within the county of *Northumberland*.

As to the objection that there is no *filacer* for *Berwick*—Though there is no *filacer*, yet the charter directs to whom the king's writs are to be directed, *viz.* the mayor, and bailiffs (a).

The plaintiffs will sustain no inconvenience; for, the mayor and bailiffs cannot have the action tried within the town of *Berwick*; they cannot be Judges in their own cause.

It clearly appears on the face of the declaration, that the premises in question are within the liberties and precincts of the town of *Berwick-upon-Tweed*, and part of the land granted by the charter to the corporation of that borough.

Judgment for the defendant.

The plaintiffs were afterwards allowed to amend, on payment of costs.

(a) See the case of *The Mayor, Bailiffs, and Burgesses of the Borough of Berwick-upon-Tweed v. Williams* (10 B. Moore, 266). There, the mayor, bailiffs, and burgesses of *Berwick* being plaintiffs in the suit, the writ was directed to the Coroner. It was ob-

jected, that, as the Coroner was one of the burgesses, the writ should not have been directed to him, but to elisors named by the Prothonotary. The process, however, being merely *servicable*, the Court refused to set it aside.

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Monday,
April 24th.

WALLS v. ATCHESON,

THIS was an action of *assumpsit*, for use and occupation. The cause was tried before Lord Chief Justice *Best*, at the Sittings at *Westminster*, in the present Term.

The plaintiff, a widow, let to the defendant part of a furnished house in *Manchester Square*, at the rent of sixty-five guineas, for one year certain, from the 14th of *September*, 1824. The defendant quitted at the end of the first quarter, *vis.* on the 14th *December*, paying rent up to that day. About three weeks afterwards, the plaintiff let the apartments to another person, at the rent of one guinea *per week*. At the expiration of the second quarter, the plaintiff sent in an account to the defendant, charging him for a quarter's rent according to the terms of the original taking, deducting the sums received from the person to whom she had re-let the apartments, and making the defendant debtor to her for the sum of 7*l.* 5*s.* 0*d.*; which sum the defendant paid. The second tenant quitted in the beginning of *July* 1825, from which time, until the 14th of *December* following, the apartments remained vacant. The plaintiff accordingly brought this action, to recover from the defendant, 21*l.* 0*s.* 6*d.*, the balance of rent due to her from him, by the terms of the original letting.

His Lordship, being of opinion, that, by letting the apartments to another, the plaintiff had rescinded the previous contract with the defendant, directed a nonsuit.

Mr. Serjeant *Vaughan* now applied for a rule *nisi*, that the nonsuit might be set aside and a new trial had.—The defendant is not discharged from the liability imposed upon him by the terms of his contract. Having taken the premises for a year certain, he could not quit without the

The defendant took premises for a year certain, but quitted at the end of the first quarter. The plaintiff then let the premises, for a portion of the remaining three quarters, to another tenant, at a less rent; and afterwards sued the defendant for the difference:—*Held*, that, by re-letting the premises, the plaintiff had assented to the determination of the original tenancy, and dispensed with the necessity of a legal surrender.

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assent of the landlady, or a legal surrender. Here, there was no evidence of either. The plaintiff did not release the defendant, by the subsequent letting; she let the apartments on his account: and, to shew a valid surrender by operation of law, it must, according to the statute of frauds, appear in writing. In *Redpath v. Roberts* (a), it was held, that, in *assumpsit* for use and occupation of apartments which the defendant had quitted without giving notice, the fact of the plaintiff's having put up a bill to let them, was no bar to the action. Lord *Kenyon* there said—"that it was for the benefit of the defendant that the apartments should be let, nor would he infer from the circumstance of the party's endeavouring to let them, that the contract was put an end to; that there must be other circumstances to shew it, and not an act of so equivocal a kind; and that, as the plaintiff had proved the taking of the premises, and the payment of the rent, it was incumbent on the defendant to prove that the tenancy was put an end to, by express evidence." In *Mollett v. Brayne* (b), it was held, that a tenancy from year to year created by parol, is not determined by a parol licence from the landlord to the tenant, to quit in the middle of a quarter, and the tenant's quitting the premises accordingly; and in *Doe d. Read and Another v. Ridout* (c), Mr. Justice *Chambre* held, that a tenancy from year to year cannot be determined unless there be either a legal notice to quit, or a surrender in writing. In the present case, it is perfectly clear that the contract was not rescinded. The defendant was still held liable, notwithstanding the subsequent demise. There was nothing to shew a mutual assent to the determination of the tenancy.

Lord Chief Justice BEST.—By her own act, the plain-

(a) 3 Esp. Rep. 225.

(b) 2 Camp. 103.

(c) 5 Taunt. 519.

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tiff prevented the defendant from occupying these premises. She let them to another tenant. Can a landlord have two tenants, and be receiving rent from one, and at the same time holding the other liable? The case of *Mollett v. Brayne* is altogether distinguishable from the present. In *Whitehead v. Clifford* (a), it was held, that, if a landlord, in the middle of a quarter, accept from his tenant the key of the house demised, under a parol agreement, that, upon her then giving up the possession, the rent shall cease, and she never afterwards occupies the premises, he cannot recover, in an action for the use and occupation of the house, for the time subsequent to his accepting the key. Lord Chief Justice *Gibbs* there said: "In *Mollett v. Brayne*, both parties did not act on the parol notice to quit, but the tenant only. The present action can never succeed. The action for use and occupation depends, either upon actual occupation, or upon an occupation which the defendant might have had, if she had not voluntarily abstained from it. Here, the plaintiff himself takes possession of the house, and makes the profit of the premises; and it was therefore impossible for the defendant, during the same time, to have used and occupied the premises, if she would." I think both law and justice are with the defendant.

Mr. Justice PARK.—I am of opinion that my Lord Chief Justice properly nonsuited the plaintiff; and that there is no colour for calling upon us to disturb that nonsuit. The case of *Mollett v. Brayne* is very different from the present; there, the tenant had a subsisting term, which could not be determined by a mere parol surrender. Here, the plaintiff, by her own act, rescinded the contract with the defendant; and dispensed with the necessity of a surrender. In *Redpath v. Roberts*, the landlord had only offer-

(a) 5 Taunt. 518.

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ed to let the premises, but had not in fact let them: thus there was nothing to obstruct the defendant's occupation of them, had he been so minded. In *Lloyd v. Crispe* (a), the lessor having, by receiving rent from him, assented to the occupation of an assignee, he was held, by Sir *James Mansfield*, to have waived the necessity of a licence for the subsequent assignment, notwithstanding a covenant in the lease, that the premises should not be assigned without the licence of the lessor. In *Whitehead v. Clifford*, the plaintiff, the landlord, had accepted the key, and thus the tenant was prevented from occupying the house. So, here, the conduct of the plaintiff in re-letting the apartments, signified as complete an acquiescence in the tenancy being determined, as could be conveyed by the acceptance of the key.

Mr. Justice BURROUGH.—If the tenancy on the part of the defendant in this case were to be considered a continuing tenancy after the period at which he ceased to occupy the premises, the letting of them to another person was, on the part of the plaintiff, a tortious act; it was in the nature of an eviction. I think the case discloses abundant evidence that the contract was put an end to with the assent of the plaintiff herself.

Mr. Justice GASLER.—If the plaintiff had given the defendant notice, that, if he would not occupy the apartments himself, she would let them to another tenant, on his account, the case would have been different. Under the circumstances, I see no reason for disturbing the nonsuit.

Rule refused.

(a) 5 Taunt. 257.

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Monday,
April 24th.

ROWLEY v. BAYLEY.

MR. Serjeant *Wilde* moved for a rule calling on the plaintiff to shew cause why the sum of 226*l.*, which had been deposited by the defendant in the hands of the Sheriff of *Middlesex*, in lieu of special bail, should not be restored to him, on the ground of the insufficiency of the affidavit to hold to bail, in which the plaintiff swore that the defendant was indebted to him in the sum of 226*l.* "for goods sold and delivered by the plaintiff to the defendant," omitting to add, "at his request." The learned Serjeant relied upon the case of *Durnford v. Messiter* (a), where it was held, that an affidavit to hold to bail, "for money lent, and for goods sold and delivered, and for work and labour," is irregular, if it omit to state that it was "at the instance and request of the defendant," although it state that it was "to and for his use, and on his behalf."

An affidavit to hold to bail, stating that the defendant is indebted "for goods sold and delivered by the plaintiff to the defendant," is sufficient, though it omit to add "at his request."

Lord Chief Justice BEST.—There is no foundation for this application. The decision of the Court of *King's Bench* in *Durnford v. Messiter*, was considered in this Court in the case of *Berry v. Fernandez* (b), where it was held, that an affidavit of debt for money paid for a defendant, and advanced to him, need not state that the payment and advance were *at the defendant's request*. Mr. Justice *Park* rightly observed in that case, that, "very frequently, where money is received by the defendant to the plaintiff's use, it is only a conclusion resulting from the construction which the plaintiff, swearing to the best of his judgment, puts upon a transaction, from which he conceives a debt to result; but no request in fact is made by the defendant, but generally arises by implication of law." Where a trades-

(a) 5 Mau. & Selw. 446.

(b) 8 B. Moore, 332; S. C. 1 Bing. 338.

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man delivers goods, an affidavit may clearly be sufficient, without expressly stating them to have been delivered at the request of the vendee; that such is the fact, is a necessary inference. Were this not so, there would be few cases wherein a defendant could be held to bail at all for a debt contracted in the purchase of goods.

Rule refused (a).

(a) In *Eyre v. Hulton* (5 Taunt. 704; S. C., *nomine Hulton v. Eyre*, 1 Marsh. 315), an affidavit to hold to bail, stating that the defendant was indebted "for money paid by the plaintiff, for the use of the defendant," without adding that it was paid "at his request," was

held sufficient. So, also, "for work and labour done by the plaintiff for the defendant, as his servant," not stating that it was done "at his request" or "on his retainer." *Bliss v. Atkins*, 5 Taunt. 756; S. C. 1 Marsh. 317, n.

Wednesday,
April 26th.

The Court will not allow the venue to be changed after plea pleaded, unless the justice of the case clearly requires it.

BAILEY and Another v. BEAUMONT.

A RULE was, on a former day in this Term, obtained by Mr. Serjeant *Wilde*, calling on the plaintiffs to shew cause why the venue in this action should not be changed from *Middlesex* to *Yorkshire*. The affidavits in support of the motion stated, that the plaintiffs' cause of action arose in the county of *York*, and that the principal part of their demand was for work done and materials found, in and about the building and erecting a conservatory for the defendant, at his residence in *Yorkshire*; that the work had been improperly done; that the plaintiffs' bill of charges on the defendant amounted to 5,750*l.*; that the witnesses for the defendant resided in *Yorkshire*; that, in the judgment of the defendant, the conservatory should be viewed by a Jury previously to the trial; and that,

without such view, the defendant could not safely proceed to the trial of the cause.

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v.
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Mr. Serjeant *Vaughan* now shewed cause, on affidavits which stated, that a surveyor had lately examined the conservatory, and found that the materials were good, and the work well executed; that the contract for erecting the conservatory was made in *Middlesex*: that the making, fitting, and preparing the materials, were nearly all done in that county, at the plaintiffs' manufactory, and shipped on the account and at the risk of the defendant; that a view would be entirely useless, until the work was completed, which was prevented by the defendant; that he had offered to pay the plaintiffs 5,500*l.* on its completion; and that, if the cause were tried in *Yorkshire*, the plaintiffs would be under the necessity of carrying down upwards of fifty witnesses. It also appeared that issue was joined in the cause, and notice of trial given three days before the rule was obtained.

Mr. Serjeant *Wilde*, in support of his rule.—This is an application to the discretion of the Court. They may order the *venue* to be changed, if it be made to appear to them that otherwise injustice will be done. It is clear, in the present instance, that, unless the *venue* be changed, the defendant cannot have a fair trial. The Jury can only judge of the propriety of the work, and the reasonableness of the charge, by a view of the premises (a).

(a) In *Hodinott v. Cox* (8 Term Rep. 268), in covenant upon a lease, a view being proper to be had, the *venue* was changed to the county where the premises lay, though most of the plaintiff's witnesses resided in the county where the *venue* was laid. But

see the case of *The Mayor, Bailiffs, and Burgesses of the Borough of Berwick-upon-Tweed v. Shanks* (*Ante*, p. 372; S. C. 3 Bing. 459), where it was held, that covenant against the assignee of the lessee of a term, is a *local* action, it arising from a privity of estate, and

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On that alone could their judgment be formed. Justice clearly requires a view.

Lord Chief Justice BEST.—The Court undoubtedly has a general discretion to change the *venue* in all cases where justice requires it; but it is a discretion that should be exercised with caution (a). This being a transitory action, the plaintiffs had a right to lay the *venue* where they pleased; but, if it appears that justice is not otherwise likely to be done, the *venue* may be changed at any stage of the cause. The question, then, is, whether the affidavits on the part of the defendant disclose sufficient to induce us to believe that, in this case, justice will not be done if the cause be tried in *Middlesex*. I think there can be no pretence for supposing that a fair trial may not be had here. Even if a view be absolutely necessary, I see no reason for saying that the plaintiffs may not retain the *venue* where they have laid it. Suppose all the Jurors were to attend at a view, there might not be a single man of science amongst them; and this is a question that can only be determined by the evidence of men of science. A view by country gentlemen would, in my opinion, be perfectly useless; they are not, in general, persons competent to form an estimate of the value of particular work. If the *venue* were to be changed, the plaintiffs would have to send all their witnesses down to *York*, at a far greater expense than, if found necessary, a *Middlesex* Jury might be sent there to view the work; for, the Assizes at *York* frequently last more than a fortnight, during the whole

not on a privity of contract. See also, *Anonymous*, 2 Chit. 419.

(a) In *Wing v. Jenkins* (7 B. Moore, 62), on a motion to change the *venue* from *London* to *Worcester*, on the usual affidavit, an affidavit stating that the action

was brought for the seduction of the plaintiff's daughter, and that she was so ill that it was not expected she would live till the Assizes, was held to be an answer to the application.

of which time the witnesses might possibly be detained there.

The rest of the Court concurring—

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Rule discharged (a).

(a) According to the cases of Moore, 62; S. C. 8 Taunt. 169), *Talmash v. Penner* (3 Bos. & Pul. 12), and *Smith v. Walker*, (2 B. it seems that, after plea pleaded, the venue cannot be changed.

BLYTHE v. BAMPTON.

Thursday,
April 27th.

THIS was an action of *assumpsit* on the warranty of a horse.

The *first* count of the declaration stated, that, in consideration that the plaintiff, at the request of the defendant, *would* purchase of the defendant a horse, at and for a *certain price* or sum, *to wit*, the price or sum of 55*l.*, to be therefore paid by the plaintiff, the defendant undertook and promised the plaintiff, that the horse was sound. Breach—that the horse was unsound.

The *second* count was on an executed consideration.

The defendant pleaded the general issue.

At the trial, before Lord Chief Justice *Best*, at the last Assizes, at *Warwick*, the plaintiff's son, who was called as a witness to prove the contract, stated, that the defendant said that he would take 55*l.* for the horse; but that it was afterwards agreed between him and the plaintiff, that, if the latter did not gain 4*l.* or 5*l.* by the horse, the former was to return 1*l.* of the purchase-money.

It was thereupon insisted, on the part of the defendant, that this was a variance, the contract declared on being absolute and unconditional, whilst that proved was conditional, and depending upon a contingency.

His Lordship, being of opinion that this was a fatal variance, directed a nonsuit.

In *assumpsit* on a warranty of a horse, the declaration stated, that, in consideration that the plaintiff would purchase of the defendant a horse, at a certain price, *to wit*, the price of 55*l.*, the defendant undertook that the horse was sound. The proof was, that the price agreed upon was 55*l.*, and that the defendant was to return 1*l.*, if the plaintiff did not make a profit of 4*l.* or 5*l.*, on the re-sale of the horse:—Held, a fatal variance—*Dissentiente Gaselee, J.*

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Mr. Serjeant *Wilde*, on a former day in this Term, obtained a rule *nisi*, that this nonsuit might be set aside, and a new trial had.—It was not necessary to state in the declaration the price paid for the horse; at all events, the price being laid under a *videlicet*, no advantage can be taken of a mis-statement in that respect. The breach of warranty was the cause of action. It was only necessary for the plaintiff to shew the consideration for that warranty. It would have been sufficient to have alleged in the declaration, that, in consideration that the plaintiff, at the request of the defendant, would agree to buy a certain horse of the defendant, at and for a certain price to be therefore paid by the plaintiff, the defendant undertook that the horse was sound. Where the whole consideration of a promise is truly stated, and also all such parts of the promise itself, the breach of which is complained of, it is not necessary to state in the declaration other parts of the promise, not qualifying or varying in any respect the parts so complained of as being broken (*a*). The object of the *videlicet* is, to relieve the plaintiff from strict proof of the precise sum. The contract here was founded upon a certain price. The defendant was to receive 55*l.* in any event. It was not necessary to state in the declaration how that agreement was modified by something that might afterwards occur. In *Crispin v. Williamson* (*b*), the plaintiffs declared, that they agreed to sell, and the defendant to buy, certain goods and merchandize, *to wit*, three hundred and twenty-eight chests, and thirty half-chests, of oranges and lemons, at and for a *certain price, to wit*, the price of 623*l.* 3*s.* 0*d.* The contract proved was, for three hundred and eight chests, and thirty half-chests, of *China* oranges, and twenty chests of lemons, *without specifying price*—This was held to be no variance.

(*a*) See *Miles v. Sheward*, 8 East, 7.

(*b*) 1 B. Moore, 547; S. C. 8 Taunt. 107.

In that case, Mr. Justice *Burrough* referred to *Durstons v. Tuthan* (a), where the declaration stated, that, in consideration that the plaintiff would buy of the defendant forty-five sheep for 54*l.* 11*s.* 6*d.*, the defendant undertook and promised that they were sound; the plaintiff proved the price to be 54*l.* 12*s.* 6*d.*: Mr. Justice *Buller* held the variance to be fatal, *because the sum was not laid under a videlicet*, and nonsuited the plaintiff. That appears to have been the principle upon which all the cases have turned. In the present instance, the price *was* laid under a *videlicet*, and therefore the plaintiff was not confined to proof of the exact sum.

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Mr. Serjeant *Bosanquet* now shewed cause. The variance in this case is fatal. It is an established principle, that a conditional contract cannot be declared upon as absolute. The whole consideration for the contract or promise, the breach of which is complained of, must be fully stated (b); though collateral matters not relating to the subject matter in dispute, need not (c). Here, the terms of the contract are not fully and fairly stated on the face of the declaration. The contract declared on was a warranty, the consideration for which was, the purchase of a horse at a *certain price*. A *certain price*, means a price absolutely fixed. The proof was, not that the horse was purchased at a *certain price*, but, that the plaintiff was to pay 55*l.* for the horse, and if, on the re-sale, he did not make a profit of 4*l.* or 5*l.*, the defendant was to return him 1*l.* The price, therefore, was conditional and uncertain; and the condition should have appeared in the declaration.

(a) 3 Term Rep. 67, n.

(b) In *King v. Pippett* (1 Term Rep. 240), it was held, that, in cases upon contracts, it is necessary to set out the contract truly;

and that a difference in any part is fatal; because the contract is entire.

(c) See *Squier v. Hunt*, 3 Price, 68.

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[Mr. Justice *Gaselee*.—At what time would the plaintiff's right of action against the defendant arise? Must he wait until he had sold the horse?]

Mr. Serjeant *Wilde*, in support of the rule.—It cannot be denied, that the whole consideration for the contract must appear on the face of the declaration. Here, the price was no part of the consideration, and need not have been stated at all. If the sum to be paid depended upon a contingency, an allegation that the horse was sold at and for a certain price to be paid by the plaintiff, would suffice. The return of 1*l.* of the purchase-money did not depend on the price paid by the plaintiff for the horse, but upon the price he might obtain for it on the re-sale. The return formed no part of the consideration for the warranty. The inducement for the defendant's contract was, the price that the plaintiff had agreed to pay him. It was enough to state the understanding between the parties as to the price, without shewing an event that might afterwards vary that price. The contract of warranty was perfectly independent.

Lord Chief Justice *Best*.—I am sorry that I feel obliged to come to the conclusion that this is a fatal variance. We cannot too much deprecate attempts on the part of a defendant to avail himself of an objection of this sort, in order to rid himself of a contract. The law of variances is radically bad. Still, I have always understood it to be necessary, in declaring upon a contract, that the nature and description of the contract be fully and correctly set forth (a). In all the text writers, this is laid down as an inflexible rule.

(a) In *Churchill v. Wilkins*, (1 Term Rep. 447), the contract declared upon was, that the defendant should deliver to the plaintiff, all his tallow at 4*s.* per stone; the

contract proved was, to deliver at 4*s.* per stone, and so much more as the plaintiff paid to any other person: this was held a fatal variance.

If the description be not truly disclosed, the omission is fatal. If the contract be declared on as absolute, and it be proved to have been conditional, or depending upon a contingency, it is a variance. Here, the contract set forth upon the record is, an absolute contract for the purchase of a horse at a certain price; the proof is, of a contract with a condition annexed to it, *viz.* that, if the purchaser do not, on the re-sale of the horse, realize a profit of 4*l.* or 5*l.*, the vendor is to return him 1*l.* of the purchase-money. That was the whole contract; and the whole contract was the consideration for the warranty: it should, therefore, have appeared in the declaration. The cases cited are distinguishable from this. There, it was merely held, that a variance between the quantities and prices of the goods contracted for laid in the declaration, and those proved, was not material. The case of *Gladstone v. Neale* (a), is to the same effect. There, the defendant agreed to purchase certain hemp of the plaintiff, at a certain price *per* ton. The quantity not having then been ascertained, the contract described it as being "about eight tons." The declaration stated it to be a contract for "eight tons," that being found to be the exact quantity. It was objected at the trial, that this was a variance. The objection was over-ruled by Lord *Ellenborough*, and his opinion was afterwards confirmed by the Court, on a motion for entering a nonsuit. Mr. Justice *Le Blanc* there said, "that, perhaps, it might have been more accurately alleged in the declaration, that the parties contracted for a certain quantity of hemp, the amount of which was not exactly known to them at the time, but which was then supposed and described to be *about* eight tons; but which afterwards turned out to be eight tons." There, the objection merely went to the

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(a) 13 East, 410. See also, *Wildman v. Glossop*, 1 Barn. & Ald. 9.

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quantity of the article purchased, which was at the time unknown to the parties. Here, however, there was no difficulty as to the terms of the contract. The objection was not simply as to a difference of price; but a misstatement of the contract itself, by the omission of the contingency which was attached to it. If this had been a mere variance in the price agreed upon, I should feel disposed to submit to the authority of those cases; but I am not inclined to go beyond them. I am of opinion that the nonsuit should stand.

Mr. Justice PARK.—The cases cited for the plaintiff do not assist him. It is agreed, on all hands, that, if a contract be declared on as an absolute contract, unfettered by any condition or contingency, proof of a conditional contract will not support the action. Here, the contract clearly was conditional, and therefore should have been declared on as such.

Mr. Justice BURROUGH.—The law requires the greatest accuracy in the description of contracts in pleading. In declaring on a contract, it is necessary to state it truly, according to its terms. Here, the contract was not truly set out. The price is clearly part of the consideration for the warranty, and therefore cannot be said to be immaterial; it was the substantial part of the contract.

Mr. Justice GASELEE.—The statement of the price agreed to be paid for the horse, is only material so far as on that would depend the sum to be recovered back on the breach of the warranty. The sum agreed upon as the price, is the measure of the damages to be given (a). But, being laid under a *videlicet*, the price need not be strictly proved. In *Gladstone v. Neale*, the question was only as to the quantity of the article purchased. In *Cris-*

(a) See *Caswell v. Coare*, 1 Taunt. 566.

pin v. Williamson, there were two allegations in the declaration, one as to the price, the other as to the quantity. The quantity was mis-stated, and no evidence was given to shew that the price was part of the contract; yet this was held to be no variance. That case is, in my opinion, an answer to the argument, that *certain price* means a price absolutely fixed. There was no price stated in the contract there, and the plaintiff could only recover on the *quantum meruit*. I cannot see any distinction between that case and the present. The contract on the part of this plaintiff was, to pay 55*l.* for the horse. The defendant, the vendor, enters into two several warranties; the one, that the horse is sound; the other, that, if, on the re-sale, the horse does not produce to the plaintiff a profit of 4*l.* or 5*l.*, he, the defendant, will return him 1*l.* of the purchase-money. It was not necessary for the plaintiff to allege two breaches of the contract. He could not claim the 1*l.*, the horse not having been re-sold.

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Rule discharged (a).

(a) In *Miles v. Sheward* (8 East, 7), the plaintiff declared, that, in consideration of his re-delivery to the defendant of an unsound horse, which he had before then sold to the plaintiff, the defendant promised to deliver to him another horse in lieu, which should *be worth 80*l.* and be a young horse*; and then alleged a breach in both those respects. The declaration was held sufficient, though the proof was not only of a promise that the second horse should *be worth 80*l.*, and be a young horse*, but also of a warranty that it was *sound, and had never been in harness*. And in the case of *Hands v. Burton* (9 East, 349), it was held,

that proof—that the defendant agreed to sell his horse, warranted sound, to the plaintiff, for 31*l.* 10*s.*, and, at the same time, agreed, that, if the plaintiff would take the horse at that value, he, the defendant, would buy another horse of the plaintiff's brother, for 14*l.* 14*s.*, and that the difference only should be paid to the defendant—will support a count charging only, that, in consideration that the plaintiff would buy of the defendant a horse for 31*l.* 10*s.*, the defendant promised that it was sound; and that, in fact, the plaintiff *did buy the horse for that price, and did pay to the defendant the 31*l.* 10*s.**

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Saturday,
April 29th.

An acknowledgment of title by a tenant, in one who claims as heir-at-law of the person under whom the tenant had previously held, will not preclude the latter from calling in question the title of the claimant, under a plea of *non tenuit*, if it appear that such acknowledgment proceeded from a misrepresentation or a misapprehension of the nature of the title set up.

GREGORY v. DOIDGE and Another.

THIS was an action of replevin for taking the plaintiff's cattle, in a certain close of the plaintiff.

The defendant *Doidge* avowed the taking, because he said, that the plaintiff, for a long time, to wit, &c., held and enjoyed the close in which &c., as tenant thereof to him, *Doidge*, by virtue of a certain demise thereof to the plaintiff theretofore made, at and under a certain yearly rent; and that, because two years' rent was in arrear, ending on &c., the defendant *Doidge* well avowed, and the other defendant, in his behalf, well acknowledged, the taking &c., as for and in the name of a distress for the rent so due and in arrear to *Doidge*.

The plaintiff pleaded in bar, *non tenuit*: whereupon issue was joined.

At the trial, before Mr. Justice *Gaselee*, at the last Assizes for *Cornwall*, it appeared that the defendant *Doidge* claimed as heir-at-law, *ex parte paternâ*, of a person of the name of *Beare*, who was seised in fee of the close in question, and under whom the plaintiff had occupied; that *Beare* died seised of the close, *ex parte maternâ*, and that a person of the name of *Harvey* also claimed as his heir, disputing the title of the defendant *Doidge*; that, shortly after the death of *Beare*, the defendant *Doidge* and his brother went to the plaintiff's house, when the latter agreed to remain in possession of the close, as tenant to *Doidge*, at the same annual rent (*viz.* 7*l.*) as he had before paid to *Beare*; it being at the same time agreed between them, that the price of depasturing some cattle belonging to *Doidge* should be deducted from the amount of the rent: and the plaintiff gave *Doidge* 1*s.* to bind the bargain, as an acknowledgment of his title. At this time, the plaintiff was not aware of the claim of *Harvey*.

It was contended, on the part of the defendants, that,

as the plaintiff had agreed to become tenant to *Doidge*, and had thus recognized his title as landlord, he could not afterwards dispute that title.

A verdict was taken for the defendants; leave being reserved to the plaintiff to move that it might be set aside, and a verdict entered for him for the sum of 4*l.* 4*s.* 0*d.*, if the Court should be of opinion that he could, under the circumstances, dispute the title of *Doidge*.

Mr. Serjeant *Wilde*, on a former day in this Term, obtained a rule *nisi*, in pursuance of the leave reserved. He cited and relied upon the cases of *Rogers v. Pitcher* (a), and *Williams v. Bartholomew* (b); in the former of which it was held—that, if a tenant, by mistake or misrepresentation, pays rent to a person not entitled to demand it, he is not, by such payment, precluded from giving evidence, on a plea of *non tenuit*, in replevin against the supposed landlord, to shew that the latter is not entitled to the rent; and in the latter—that, if *A.*, tenant for life, subject to forfeiture, remainder over to *B.*, lease to *C.* for a term, and afterwards, apprehending that he has forfeited, acquiesce in *B.*'s claiming and receiving the rent from *C.*, his executor may, on shewing that he acquiesced under a false apprehension, recover from *C.* the amount of the rent erroneously paid to *B.*

Mr. Serjeant *Peake* now shewed cause.—It is a general principle, that a tenant cannot dispute the title of the party under whom he holds. In *Alchorne v. Gomme* (c), to a cognizance in replevin for rent in arrear to D. T. and H. T., the plaintiff pleaded in bar, that, before they had any interest in the premises, one T. R. was seised thereof, and mortgaged them in fee to J. C.: and that, he being

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(a) 1 Marsh. 541; S. C. 6 Taunt. 202.

(c) 9 B. Moore, 130; S. C. 2 Bing. 54.

(b) 1 Bos. & Pul. 326.

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so seised, and after the mortgage became absolute, under colour of a certain pretended agreement of sale of the premises between the said *T. R.* and *D. T.* and *H. T.*; the two latter demised them to the plaintiff, who thereupon became possessed thereof, and so continued until the time when &c.; that *J. C.*, the mortgagee, afterwards assented to and confirmed such demise to the plaintiff, and required him to attorn to him as such mortgagee; which the plaintiff did, and agreed to pay him the arrears of rent then due; but that, he having neglected to pay the same, and the said *D. T.* and *H. T.* not having any legal estate in the premises, *J. C.*, as mortgagee, distrained on the plaintiff for such arrears; who, in order to prevent his goods from being sold under the distress, necessarily paid such arrears to *J. C.*, as such mortgagee; and so no rent was in arrear from the plaintiff to *D. T.* and *H. T.* The Court held this plea bad, on special demurrer, as it amounted in substance to a plea of *nil habuit in tenementis*. There, the plaintiff was in possession under the party who distrained. The case of *Rogers v. Pitcher* is distinguishable from the present, as there the plaintiff did not originally receive possession from the avowant. Here, the demise by the defendant *Doidge*, soon after the death of *Beare*, puts the plaintiff in the same situation as if he had originally received possession under *Doidge*. The plaintiff not only acknowledged the title of *Doidge* in the first instance, but he has continued to occupy for two years under the agreement, without disputing it.

Mr. Serjeant *Wilde*, in support of his rule, was stopped by the Court.

Lord Chief Justice BEST.—This was an action of replevin. The plaintiff, by his plea, denies the holding under the defendant *Doidge*. It appears that the close, in respect of which the distress was taken, was originally held

by the plaintiff, under one *Beare*. On the death of *Beare*, the defendant *Doidge*, claiming to be entitled to the premises as his heir-at-law, induced the plaintiff to assent to become tenant of the premises to him. The plaintiff did not then know the nature of *Doidge's* title. The question now is, whether the plaintiff can, after what he has done, shew that *Doidge* is not his landlord. I am of opinion, that, as the plaintiff did not come in under *Doidge*, and made the agreement with him in ignorance of the defect in his title, he is not thereby precluded from shewing that *Doidge* had nothing in the premises. It is a general principle, that payment of rent by mistake will not create the relation of landlord and tenant. If authority were necessary, this point has been expressly decided in *Rogers v. Pitcher*, which case is, in all its circumstances, completely applicable to the present. If a person continue in possession of premises which he originally occupied under another, and a stranger afterwards require him to pay rent, if he make such payment by mistake or under a misrepresentation, he is not precluded from calling in question the right of the party making the demand on him. In *Williams v. Bartholomew*, Mr. Justice *Buller* said (a), that, if the tenant could have proved that his attornment proceeded on the misrepresentation of him who claimed as remainderman, he might have proved that another was still alive and entitled; and Mr. Justice *Heath* said: "Suppose a lease made, and a person claim as heir-at-law, to whom the rent is paid, and afterwards the true heir-at-law is discovered, will it be said that he shall not recover?" In *Fenner v. Duplock* and Another (b), it was held, that payment of rent by a tenant to his landlord, after the title of the latter had expired, and after the tenant had received notice of an adverse claim, did not amount to a virtual attorn-

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(a) 1 Bos. & Pul. 328.

(b) 9 B. Moore, 38; S. C. 2 Bing. 10.

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ment, nor create a new tenancy, nor constitute an acknowledgment of a continuance of title in the landlord, unless, at the time of such payment, the tenant was acquainted with the precise nature of the adverse claim, or the grounds on which his landlord's title had terminated. In *Alchorne v. Gomme*, the plaintiff came in under the person whose title he intended to dispute. Here, the plaintiff came in under *Beare*, and not under *Doidge*; therefore, he had a right to dispute the title of the latter.

Mr. Justice PARK.—It is a clear rule of law, that a tenant shall not dispute the title of the landlord under whom he holds. Here, the plaintiff was let into possession under a former owner; his acknowledgment of the title of *Doidge* proceeded either from fraud on the one side, or misapprehension on the other. The cases of *Rogers v. Pitcher*, and *Fenner v. Duplock*, are precisely in point. In *Alchorne v. Gomme*, the tenant came in, in the first instance, under the landlord whose title he wished to dispute.

Mr. Justice BURROUGH, and Mr. Justice GASELER, concurring—

Rule absolute.

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May 1st.

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At a special vestry, it was resolved, "that an indictment preferred against the parish for non-repair of a highway, should be opposed; and

that the surveyors be desired to take the necessary steps for carrying this resolution into effect." —*Held*, that the inhabitants who had signed the resolutions were not personally responsible for the costs of the attorney employed by the surveyors for this purpose.

THIS was an action of *assumpsit*, brought by the plaintiff, an attorney, against the defendants, two magistrates of the county of *Kent*, to recover the amount of his bill of costs, for defending a bill of indictment preferred against the inhabitants of *Speldhurst*, for not repairing a road.

At the trial, before the Lord Chief Baron, at the last Assizes at *Maidstone*, the following facts appeared in evidence:—

In *April*, 1821, at a special vestry holden for the parish of *Speldhurst*, at which the defendants and several other parishioners were present, the following resolutions were entered into;—

“ *Speldhurst* Parish.—At a special vestry held in the said parish, on *Friday*, the 27th *April*, 1821, pursuant to public notice, for the purpose of taking into consideration the propriety of resisting an indictment instituted against the inhabitants of the said parish, to compel them to repair a certain piece of road. Resolved—

“ *First*—That the above indictment be opposed.

“ *Secondly*—That the surveyors be desired to take the necessary steps for carrying the first resolution into effect.”

These resolutions were signed by the chairman, the two defendants, and five other parishioners who attended the vestry; but nothing was said as to employing an attorney. The plaintiff was the vestry-clerk, and was present as such at the meeting. The then surveyor of the highways, *Robert Fry*, afterwards gave the plaintiff instructions to defend the indictment, which he accordingly did. In *October*, 1824, he delivered his bill of costs, which amounted to 292*l.* 19*s.* 7*d.*, to the then surveyor, *James Richardson*. This bill was headed—“ The *Surveyors* of the parish of *Speldhurst*, debtors to *Walter Spratt*.” *Richardson*, the surveyor, refusing to pay this demand, the plaintiff commenced the present action.

It was contended, on the part of the defendants, that, by signing the resolutions entered into at the vestry, they had incurred no personal liability; and that the surveyor of the highways for the time being was the person re-

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sponsible, he being empowered to raise money for such purposes, by a rate on the inhabitants, according to the mode pointed out by the statute 13 *Geo. 3*, c. 78, s. 65 (a).

The Lord Chief Baron refused to nonsuit the plaintiff, but said, that, as the case raised a question of considerable importance, he would reserve it for the consideration of the Court. His Lordship referred to the case of *Higgins v. Livingston* (b), argued in the House of Lords, on an appeal from the Court of Session in *Scotland*, on the construction of a turnpike-act; where trustees, appointed with the usual powers, borrowed money on their own security, and, in an action brought by one for contribution, it was held that each trustee was personally liable.

The Jury, under his Lordship's direction, returned a verdict for the plaintiff, for the amount of his bill.

Mr. Serjeant *Taddy*, on a former day in this Term, obtained a rule *nisi*, that this verdict might be set aside, and a nonsuit entered, upon the point reserved. He cited the cases of *Lanchester v. Tricker* (c), and *Lanchester v.*

(a) By which it is enacted—
“That, if the inhabitants of any parish, township, or place, shall agree, at a vestry or public meeting, to prosecute any person by indictment, for not repairing any highway within such parish, township, or place, which they apprehend such person was obliged by law to repair; or for committing any nuisance upon any highways; or shall agree at such vestry meeting to defend any indictment or presentment preferred against any such parish, township, or place; it shall and may be lawful for the surveyor of such parish, township, or place, to charge in his account

the reasonable expenses incurred in carrying on or defending such respective prosecutions, after the same shall have been agreed to by such inhabitants at a vestry or public meeting, or allowed by a Justice of the Peace within the limit where such highway shall be; which expenses, when so agreed to or allowed, shall be paid by such parish, township, or place, out of the fines, forfeitures, compositions, payments, and assessments, authorized to be collected and raised by virtue of this act.”

(b) Not reported.

(c) 8 B. Moore, 20; S. C. 1 Bing. 201.

Frewer (a); in the latter of which it was held, that a parishioner, by attending a vestry meeting, and signing an order for the repairs of the church, does not become personally or individually liable. There, the plaintiff, who was one of the churchwardens, and had, in that character been sued by the tradesmen employed by him to do the repairs, sought to recover from the defendant, who was one of twenty parishioners that had attended the vestry, and signed the order, a proportionate part of the sum that he had been obliged to pay; and Lord Chief Justice *Best* said (b): "The repairs were not to be paid for by the persons signing the order, but as pointed out by law, *viz.* by a rate on all the parishioners who were chargeable; and the personal liability of those who went to the vestry, cannot be implied from their mere attendance there, but only as being liable to the rate to be imposed on them thereafter, and to which all the parishioners who were rateable were equally liable to contribute."

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Mr. Serjeant *Bosanquet*, and Mr. Serjeant *Wilde*, now shewed cause.—On principle and authority, the plaintiff is clearly entitled to retain his verdict. The relative situations of the parties are these: The plaintiff was the vestry-clerk of *Speldhurst* parish; the defendants attended as inhabitants at a vestry meeting. At that vestry, resolutions were entered into, and signed by the defendants, authorizing the surveyors of the parish to take the necessary steps to defend an indictment preferred against the parish for the non-repair of a highway. The plaintiff was accordingly employed by one of the surveyors, to carry into effect the resolutions of the vestry; and, although the name of the plaintiff was not expressly mentioned in the resolutions, as the party to whom the matter was to be

(a) 9 B. Moore, 688; S. C. 2 Bing. 361.

(b) 9 B. Moore, 692.

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entrusted, yet the finding of the Jury places him in the same situation as if he had actually been retained by the vestry. The persons who attended this vestry are not to be considered as standing in the situation of mere public trustees, but as being individually liable to contribute to the repairs of the road; which liability they sought to evade. Those who take upon themselves to authorize the contracting of an expense, should see that they have in their hands funds wherewith to defray that expense; or, at all events, that they have the means of obtaining them. If they direct a party to do certain acts, and he does them, thereby incurring charges, he must necessarily look to them to reimburse him. This is a far stronger case than that of trustees of roads or of navigations, appointed under acts of Parliament, who have no interest in the subject-matter; and yet, if they give an order in their public character of trustees, unquestionably, they are personally liable to the individual they employ. The cases of *Lanchester v. Tricker*, and *Lanchester v. Frewer*, stand on grounds very different from the present. The plaintiff, in those cases, was one of the churchwardens of the parish of *St. James, Bury St. Edmonds*. At a meeting of the vestry, it was resolved, that certain repairs should be done to the tower of the parish church. The repairs were accordingly done, and the plaintiff was sued by the persons he had employed to do the work, and eventually was compelled to pay their demands. He afterwards sued his co-churchwarden (the defendant in the first action), and recovered against him one half of the amount. He then sued the defendant in the second action, to recover a further proportionate part from him, he being one of the persons who had signed the resolutions at the vestry. The Court held, that the defendant was not liable to contribute to the repairs; but that it was the duty of the churchwardens to impose a rate upon the parishioners for that purpose. There, it was properly the business of the churchwardens

to employ the artificers in doing the necessary repairs. Here, the surveyor was the mere agent of the vestry, by whose resolution he was directed to take all necessary steps in the opposing the indictment. It was the business of the vestry to retain an attorney, and they authorized the surveyor to do so. In *Horsley v. Bell* (a), a bill was filed by the undertaker of a navigation in *Yorkshire*, against the commissioners named in the act of Parliament by which the concern was regulated, who had signed several orders. Three questions were raised—*First*, whether the defendants were personally liable—they contending that they were merely exercising a public trust, and that the credit was given to the undertaking itself, not to them personally; and, therefore, that the remedy was only *in rem*—*Secondly*, whether all who had been present at any of the meetings, and had signed some, but not all of the orders, were liable as to all the orders, or only as to those which they had respectively signed—*Thirdly*, whether the plaintiff's remedy was in equity, or only at common law. The Lord Chancellor, considering the case one of novelty and importance, was assisted by Mr. Justice *Gould* and Mr. Justice *Ashurst*, the latter of whom said: "The principal question is, whether the defendants are liable in their private capacities, or the plaintiff has given credit to the fund. I think the defendants are *personally* liable; it would be hard that the plaintiff, who has done the work at a reasonable price, without any extraordinary profit, should have no remedy." So, in *Eaton v. Bell* (b), by an inclosure-act, the commissioners were empowered to make a rate to defray the expenses of passing and executing the act; and it was enacted, that persons advancing money should be repaid out of the first money raised by the commissioners; expenses were incurred in the execution of the act, before any rate was made;

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(a) 1 Brown's Ch. Cas. 101, n.

(b) 5 Barn. & Ald. 34.

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to defray these expenses, the commissioners gave drafts upon their bankers, requiring them to pay the sums therein mentioned "on account of the public drainage, and to place the same to their account, as commissioners;" the bankers, during a period of six years, continued to advance considerable sums by paying these drafts—it was held, that the commissioners were personally responsible to the bankers for the drafts so made (a). Lord Chief Justice *Abbott* there said (b): "Upon principle, as well as upon the authority of the case of *Horsley v. Bell*, I am clearly of opinion, that the commissioners in this case were personally liable;" and Mr. Justice *Bayley* said (c): "The form of the draft is, 'to pay A. B., or bearer, on account of the public drainage.' The persons, therefore, who signed that order, assert that the money is to be applied to the purpose of the public drainage. The draft then goes on, 'and place the same to our account, as commissioners of the inclosure-act.' Therefore, the money is to be placed to their debit in the account which they have as commissioners. It does not say, 'place the same to the account of the inclosure;' but, 'to our account as commissioners.' Now, the defendants must have known what they had collected, and what means they had of collecting more; and they ought to have taken care, before they drew drafts, that they had money to reimburse the persons who advanced money on those drafts." So, here, the vestry-

(a) By an act of Parliament for the establishment of a market, and the repair of roads, in the town of *Bognor*, in *Sussex*, the expenses attending the passing of the act were directed to be paid out of the tolls raised or levied, or to be raised or levied, under it. The attorney who procured the act, sued the clerk to the commissioners named therein, for the

amount of his bill—it was held, that, to entitle him to recover, he was bound to shew that there were in the hands of the commissioners, funds which had been raised or levied by tolls, or otherwise, sufficient to satisfy his demand. *Andrews v. Dally*, 1 Moore & Payne, 490.

(b) 5 Barn. & Ald. 40.

(c) *Ib.* 41.

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men, before they signed the resolutions, should have known whether they had the means of defraying the expenses of the person they employed. It was no part of the duty of the surveyor, to defend the indictment: in carrying into effect the resolutions of the vestry, by appointing an attorney to conduct the defence, he was not acting in the character of surveyor, but merely in his individual capacity, as agent for the vestry. Trustees or commissioners under canal or turnpike-acts, and the like, may certainly contract in such a manner as to exclude any personal liability; but then it is incumbent on them expressly to do so. The only case that forms an exception to this, is that of an officer who gives orders for regimental supplies. The plaintiff, unless he can recover against the defendants, has no remedy against any one. The surveyor, by whom he was employed, merely acted as the agent of the inhabitants assembled in vestry. Those, therefore, who were present at the vestry were the real parties employing the plaintiff, and the parties who ought to be responsible. The proceedings incident to the indictment continued for three years. The surveyors are appointed annually. The plaintiff could not apportion his charge. In a case of *Brook v. Guest*, tried before Lord Chief Justice *Abbott*, at the *Stafford* Summer Assizes, in 1825, his Lordship held a churchwarden personally responsible to an individual whom he had employed to draw plans of a church for the inspection of the commissioners for building new churches, under the statute 58 *Geo.* 3, c. 41.

Mr. Serjeant *Taddy*, in support of his rule.—Persons who attend vestries for a given purpose known to the law, and which the vestry is competent to discharge, do not contract individually. The plaintiff was not employed by the vestry, but by the surveyor. This case is different from that of commissioners or trustees under inclosure, navigation, or turnpike-acts, who are voluntarily appoint-

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ed, and are the persons who give directions; they are acting for particular purposes, and not in the discharge of any public duty, or as belonging to a public body known to the law. The vestry, by the common law, represents the whole parish. A vestry-man who concurs in a resolution, does not thereby become personally liable. The cases of *Lanchester v. Tricker*, and *Lanchester v. Frewer*, are decisive upon this point. The resolution in question was a general resolution, applicable to the general affairs of the parish. Personal liability was not contemplated. The attending at vestries is a public duty; the circumstance of a vestry meeting for public purposes, excludes the idea of such a responsibility attaching to the individuals composing it. Were it otherwise, none would attend vestries. In *Brook v. Guest*, the order was given by the churchwarden personally, and was totally unconnected with any public duty: that was the ground of the decision. Here, it was in the discretion of the surveyor to appoint an attorney or not. The defendants never interfered in the business, further than signing the resolutions. The plaintiff himself recognized the surveyor as the person by whom he had been employed; for, his bill was, in the first instance, sent in to him.

Lord Chief Justice BEST.—I do not mean to question the propriety of any of the decisions to which we have been referred. I fully acquiesce in them; but I am clearly of opinion that they have nothing to do with this case. In all those cited for the plaintiff, the commissioners voluntarily became such; they put themselves forward. They stand in a very different situation from inhabitants of a parish concurring in acts done by the parishioners in vestry assembled. As to their liability to the repairs of highways, their case is materially distinguishable from that of commissioners under turnpike-acts, who have power to raise tolls, and thereby reimburse themselves for any ne-

cessary outlay. I agree with the opinion expressed by Lord *Thurlow* in *Horsley v. Bell*—"Who would make a contract on the credit of tolls, which it is in the power of the commissioners to raise or not at pleasure? Then, upon whose credit must the contract be? Certainly that of the commissioners who act. It is their fault, if they enter into contracts, when they have not money to answer them. They have made themselves liable by their own acts." It would be unjust in such a case to allow these commissioners to turn round and say that they have no funds, when the money or goods were furnished to them upon the faith of their possessing funds, or the means of acquiring them. The only excepted instance that I am aware of, is that of a corporation. The case put by my brother *Wilde*, of an officer giving orders for supplies for his regiment, involves altogether a different principle; he is known to contract only as a government agent. In *Higgins v. Livingston*, the parties sought to be charged were commissioners under a turnpike-act, who were invested with the usual powers for making contracts, raising tolls, and borrowing money for the purposes of the act; and they had the means of reimbursing themselves for any liability that they might incur. How are vestry-men to reimburse or indemnify themselves? In *Brook v. Guest*, the defendant was churchwarden, and, as such, might have imposed a rate on the parishioners for any expense necessarily incurred by him in his official capacity. In *Lanchester v. Tricker*, several parishioners attended at a vestry, and signed resolutions authorizing the churchwardens to cause the tower of the parish church to be repaired; the repairs were done; a rate was made by the churchwardens to defray the expenses; this rate was, on appeal, quashed; pending the appeal, the plaintiff, one of the churchwardens, was sued by the tradesmen, and eventually obliged to pay the whole charge for the work done; he thereupon sued his co-churchwarden for con-

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tribution; the defendant pleaded in abatement, the non-joinder of those parishioners who attended the meeting and signed the resolution—the Court held the plea bad, and said (a): “If the doctrine contended for were sanctioned, it would have the effect of rendering every parishioner liable; in which case, it would be necessary that all should be joined in the action. The persons who attended and signed the orders of vestry, acted merely as vestry-men, and affixed their signatures in that character only, without any intention to render themselves individually or personally liable.” The plaintiff recovered in that action one half of the amount which he had been called upon to pay. He afterwards brought an action (*Lanchester v. Frewer*) against one of the individuals who had signed the resolution at the vestry, for a further proportionate part of the expense; but the Court held, that the defendant’s having signed the resolution did not render him personally liable for any part of the consequent expenses. The case of *Eaton v. Bell*, was decided on the same principle. It was there holden, that commissioners under an inclosure-act, by which they were empowered to make a rate for defraying the expenses of executing the act, were liable to their bankers for advances made in respect of the inclosure. Mr. Justice *Bayley* said (b): “The defendants must have known what they had collected, and what means they had of collecting more; and they ought to have taken care, before they drew drafts, that they had money to reimburse the persons who advanced money on those drafts.” In that case, the defendants were held to be answerable, on the ground that they had power to raise money by making rates, and thereby to reimburse themselves. Here, the defendants have no such power. This is not at all like the case of a party voluntarily accepting a commission to do certain acts, accompanied with a power

(a) 8 B. Moore, 22.

(b) 5 Barn. & Ald. 41.

to levy rates or tolls, by way of indemnity. The defendants merely attended a vestry. The individuals composing that vestry did not employ the plaintiff; but they desired the surveyor of the highways to do that which formed part of his duty. If the surveyor had proceeded according to the directions of the 66th section of the statute (13 Geo. 3, c. 78), his expenses would have been allowed, and paid in the manner thereby directed; that is, "out of the fines, forfeitures, compositions, payments, and assessments authorized to be collected and raised by virtue of the act." The vestry are not to undertake the prosecution or defence of indictments, but only to put the surveyor in motion. That is all that these defendants have done. There is nothing to shew a personal undertaking by the defendants, or by the other parties who attended the vestry, to pay. All that the vestry had to do, was, to call upon the surveyor to do his duty, and to examine the charges in his accounts, and approve them if found reasonable. Besides, it appears that this indictment was in progress for three or four years. Therefore, if the law was as is contended for on the part of the plaintiff, every inhabitant of a parish would be placed in this situation—if he attended at a vestry, and signed resolutions at such vestry, directing certain acts to be done, and, soon after, ceased to be an inhabitant, and retired to a distant part, he might be called upon, years afterwards, to contribute towards expenses incurred in the prosecution of that over which he had no control, from which he derived no benefit, and for which he had no power to reimburse himself out of any parochial fund or rate. The plaintiff should have delivered his bill (which it appears amounted to upwards of 290*l.*) from time to time, as the business proceeded, in order that the parish might be enabled to judge whether or not it would be advisable to defend at so great an expense. This they would have been enabled to do, if the plaintiff had made application to the surveyor

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within a reasonable time. An equal rate might then have been assessed upon each inhabitant. "If (as I said in *Lanchester v. Frewer*) we were to hold, that the present action could be maintained, it would establish this principle, *vis.* that, if a parishioner attends a vestry meeting, and signs an order for the repairs of his church (or for any other purpose), although he has no intention of contracting any personal liability, or rendering himself responsible with others who might attend at such vestry, still that he would be liable to pay. If that were law, it would produce the greatest injustice, inasmuch as all present would be liable to contribute alike; and a person who had but five pounds a-year in the parish, might be called on to pay as much as a man who had a thousand; and but few would be found to attend vestry meetings, if they were to be subjected to such a responsibility."

As, therefore, the act of these defendants, in attending the vestry, and signing the resolutions there entered into, does not amount to an undertaking to make themselves personally responsible, but was merely done for the purpose of putting the surveyor in motion; and, as the contract entered into with the plaintiff, was entered into only by the surveyor, who ought to have paid the plaintiff's bill, and might have procured a rate to be made to reimburse him, I am of opinion that this action is not maintainable.

Mr. Justice PARK.—I am of the same opinion. If, as my Lord Chief Justice has observed, attending at a vestry made a parishioner liable for all acts done thereat, no inhabitant of respectability would attend; and the consequence would be, that the business of the parish would fall into inferior and irresponsible hands. The statute seems to me to decide the question. The 66th section provides, "that, if the inhabitants of any parish, township, or place, shall agree, at a vestry or public meeting,

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to prosecute any person, by indictment, for not repairing any highway within such parish, township, or place, which they apprehend such person was obliged by law to repair, or for committing any nuisance upon any highway; or shall agree, at such vestry meeting, to *defend* any indictment or presentment preferred against any such parish, township, or place, it shall and may be lawful *for the surveyor of such parish, township, or place, to charge in his account the reasonable expenses incurred* in carrying on or defending such respective prosecutions." The plaintiff was employed by the surveyor; he should have delivered him his bill *de anno in annum*, in order that the surveyor, who is an annual officer, might charge the same in his accounts with the parish, and procure its allowance. If the bill had been delivered yearly, the surveyor would then have had the means of obtaining it from the vestry, or, in case they refused to agree to his account, by the allowance of a Justice of the Peace. The cases cited for the plaintiff are distinguishable from this; for, commissioners and trustees under acts of Parliament obtained for private or local purposes, act voluntarily, and have the means of relieving themselves from all responsibility. In *Higgins v. Livingston*, the commissioners entered into personal contracts, and they were therefore held liable to such contracts as they had actually signed. That judgment was affirmed in the House of Lords. In *Brook v. Guest*, the defendant, a churchwarden, was held personally liable for the expense of plans procured by him, of his own accord, for the purpose of laying before the commissioners for building additional churches, under the 58 Geo. 3, c. 65. The cases of *Lanchester v. Tricker* and *Lanchester v. Frewer* do not, in their circumstances, altogether apply; but the general principle there laid down, that the mere act of a parishioner assenting to a resolution entered into at a vestry, does not create a personal liability, does apply in the present case.

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Mr. Justice BURROUGH.—If the Lord Chief Baron had been acquainted with the mode of conducting parish affairs, he would have felt no difficulty in this case. The surveyor is an annual officer; each surveyor makes a rate to cover the charges incurred by him during the time he is in office. The plaintiff, who it appears was the vestry-clerk, must have been aware of this, and he ought at least to have delivered his bill within each year, in order that each succeeding surveyor might charge his proportion of it in his accounts of the current year; and thus the burthen would have been imposed upon those who were interested in the matter, *viz.* the inhabitants for the time being. The statute has pointed out the course to be pursued. None of the cases that have been cited, have, in my opinion, any bearing upon this; nor, indeed, can any case apply; for, this depends upon its own special circumstances. There was no promise, either express or implied, to render the defendants liable. If even the surveyor had paid the money himself, he could not have sued them for it; but could only reimburse himself by means of a rate assessed upon the whole parish. If the cause had been tried before me, I should, without hesitation, have nonsuited the plaintiff.

Mr. Justice GASELEE.—I concur with the rest of the Court in thinking that the rule for entering a nonsuit in this case should be made absolute. The cases cited do not apply. It is unnecessary here to consider what would have been the consequence, if the defendants and the other vestry-men had signed an order directing a stranger to do particular work. This plaintiff was no stranger. The defendants did not direct or authorize him to do any act. They merely attended at a meeting of the vestry, called for the purpose of taking into consideration the propriety of defending an indictment that had been preferred against the parish for the non-repair of a highway;

and, it being resolved to defend it, they signed resolutions to that effect, and directed their surveyor to take the necessary steps. This was the proper course. There is no ground for saying that the defendants have incurred any personal liability.

Rule absolute.

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**Twiss, Assignee of WRAGG, an Insolvent Debtor, v.
WHITE, Gent., one &c.**

*Tuesday,
May 2nd.*

THIS was an action of *assumpsit*, by the assignee of the estate and effects of one *Wragg*, an insolvent debtor, for money had and received by the defendant to the use of the insolvent before, and of the plaintiff, as assignee, after his discharge.

The defendant pleaded *non assumpsit*, and a set-off.

The cause was tried before Mr. Justice *Holroyd*, at the last Assizes for *Cambridge*. The evidence was as follows:—

In *May*, 1822, the defendant was employed by *Wragg* to sell certain estates in *Cambridgeshire*, by public auction. On the 30th of that month, the estates were put up; but part of them only was sold. On the 15th *June* following, a person named *Clear* entered into an agreement with *Wragg* for the purchase of certain copyhold premises, part of the property which remained unsold. On the 28th *July*, *Wragg* was arrested, and, on the 12th *December*, obtained his discharge under the Insolvent Debtors' Act. Whilst *Wragg* was in prison, it was discovered that the copyhold property which he had agreed

A. agreed with *B.* for the sale of a copyhold estate, which had previously, by mistake, been surrendered to *C.* *A.* was afterwards arrested, and discharged under the Insolvent Debtors' Act. Subsequently to *A.*'s discharge, the mistake being discovered, *C.* surrendered back the estate to *A.*, who immediately surrendered to *B.*, the purchaser; the consideration-money being paid to the defendant, the attorney of *A.*, to whom he had given a bond for 40*l.*, for money borrowed, which, together with the amount of the bill of costs due to him

from *A.*, it was agreed he should retain out of the produce of the estate. The assignee of *A.* sued the defendant for the amount received by him, as money had and received to his use;—*Held*, that, although the *legal* estate in the copyhold was not in the insolvent at the time of his discharge, by reason of the erroneous surrender to *C.*, he had still such an *equitable* interest in it as would pass by the assignment:—*Held* also, that the defendant had an equitable lien on the purchase-money in his hands, for the amount of the bond given to him by the insolvent, and also for his bill of costs.

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to sell to *Clear*, had, by mistake, been included in a conveyance of some other premises to the trustees of Lord *Hardwicke*, in 1807. On the 30th *December*, 1822, the trustees surrendered the premises in question to *Wragg*, who, on the same day, surrendered to *Clear*, in consideration of 220*l.*, which was paid to the defendant, on account of *Wragg*, on the following day.

The defendant claimed a right of lien, or a set-off, against the sum so paid to him by *Clear*, on account of a bill of costs for 111*l.* 18*s.* 10*d.*, for business done for *Wragg*, principally in the effecting the transfer of this property; and also, for a debt of 40*l.* due to him from *Wragg*, on a bond dated the 18th *May*, 1822; both which sums, it had been agreed between the defendant and *Wragg*, before the arrest of the latter, should be retained by the defendant out of the consideration-money paid for the copyhold by *Clear*. The balance, 68*l.* 1*s.* 2*d.*, was tendered to the plaintiff before the commencement of the action.

It was also contended, for the defendant, that the proceeds of the copyhold sold to *Clear*, were property accruing to the insolvent after his discharge; and, therefore, that the plaintiff was not entitled to recover them by action, but should have applied to the Insolvent Debtors' Court to cause execution to be issued on the judgment entered up in that Court against the future effects of the insolvent, in pursuance of the statute 1 *Geo.* 4, c. 119, s. 30. The case of *Hepper v. Marshall* (a) was cited, in support of that position.

The Jury, under the direction of the learned Judge, returned a verdict for the plaintiff, for 68*l.* 1*s.* 2*d.*, the balance admitted to be due; leave being reserved—to the defendant, to move to enter a nonsuit, in case the Court should be of opinion that the plaintiff could not maintain the action—to the plaintiff, to move to increase the da-

(a) 9 B. Moore, 710; S. C. 2 Bing. 372.

mages by the sum of 151*l.* 18*s.* 10*d.*, the amount of the debt and bill of costs claimed to be due from *Wragg* to the defendant. It was also agreed, that, if the Court should allow the set-off claimed by the defendant, it should be referred to an arbitrator to ascertain what was due to him beyond the bond debt, on account of his bill of costs.

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Mr. Serjeant *Taddy*, for the defendant, on a former day in this term, accordingly obtained a rule *nisi* for a nonsuit; and, on the same day—

Mr. Serjeant *Vaughan*, for the plaintiff, obtained a rule *nisi* that the damages might be increased to 220*l.*

Mr. Serjeant *Vaughan* and Mr. Serjeant *Wilde* now shewed cause against the first rule, and supported the last. The insolvent, being possessed of certain copyhold estates, had contracted to surrender part of them to the trustees of Lord *Hardwicke*. By mistake, the property in question in this cause was included in that surrender. The trustees, therefore, as to this property, stood in the situation of trustees for the insolvent before the assignment, and for the assignee after. The mistake being discovered, the trustees, after the discharge of the insolvent, gave to the defendant a power of attorney for the re-surrender of the estate. It has been contended, that, as this surrender was after the assignment, the property so surrendered was subsequently acquired property, and consequently did not pass to the plaintiff by the assignment. But the insolvent had at that time an equitable interest, which passed to his assignee. The plaintiff, therefore, had a right to the proceeds. In *Taylor v. Sir T. Plumer* (a), where a draft for money was entrusted to a broker to buy exchequer bills for his principal, and the

(a) 3 Mau. & Sel. 562.

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broker received the money and mis-applied it, by laying it out in the purchase of *American* stock and bullion, intending to abscond therewith to *America*, but was taken before he quitted *England*, and thereupon surrendered the securities for the stock and the bullion to the principal, who sold them and received the proceeds—it was held, that the principal was entitled to withhold the proceeds from the assignees of the broker, who had become bankrupt on the day on which he so received and mis-applied the money. So, here, on the same principle, as the insolvent surrendered his equitable interest in the estate without the knowledge of his assignee, the latter was entitled to recover the proceeds. The defendant had no lien upon the money in his hands for the amount of the bond given for money advanced by him before the imprisonment of the insolvent. The proceeds did not exist until after the assignee was appointed. At all events, no lien could arise out of the transaction as against the assignee. The bill of costs refers to other expenses than those connected with the sale of the estate. The plaintiff, therefore, is entitled to a verdict for the whole sum retained by the defendant, as money received to his use.

Mr. Serjeant *Taddy*, *contra*.—The defendant clearly had a lien on the proceeds of the sale of the estate, for the amount of his costs, which were principally incurred in procuring the surrender and conveyance. If the insolvent had a right to the proceeds, he had also a right to charge them with an equitable lien; the assignee takes subject to the same equity. But, at the time of the assignment, the insolvent had not even a perfect equitable interest in the property; he had only a relief in equity against the trustees of Lord *Hardwicke*, to whom the estate had been conveyed by mistake: and such a claim for equitable relief could not be a subject of assignment under the Insolvent Debtors' Act.

Lord Chief Justice BEST.—I am of opinion that the plaintiff was entitled to recover in this action, to the extent of the balance of the purchase-money of the estate sold by the insolvent to *Clear*, after deducting for the claims of the defendant. The case of *Hepper v. Marshall* is not applicable to the present. There, it was only decided, that the assignment of the property of an insolvent debtor, under the statute 1 *Geo.* 4, c. 119, only transfers to the assignee the property of which the insolvent was possessed at the time of presenting his petition for his discharge, and does not pass any after-acquired property. In that case, a distinction was taken between the case of a bankrupt and that of an insolvent; inasmuch as, by the express terms of the statutes 13 *Elix.* c. 7, and 21 *Jac.* 1, c. 19, the after-acquired property of a bankrupt becomes vested in his assignees; whereas, that of an insolvent can only be obtained under the warrant of attorney and judgment authorized to be entered up thereon, by the 25th section of the Insolvent Debtors' Act, upon which the Insolvent Court may permit execution to be sued out in one of the superior Courts, in the name of the assignee. But, here, the property in question was vested in the insolvent before his imprisonment, and therefore it passed to his assignee. The statute (a) vests in the assignees all the insolvent's estate, effects, *rights*, and *powers*; it conveys all his equitable as well as his legal estate. The insolvent, here, clearly had an equitable interest in the estate which had been by mistake conveyed to the trustees of Lord *Hardwicke*; which they, it appears, on the first intimation given to them of the error, re-conveyed to the insolvent, without compulsion. The property belonged to the insolvent when thus re-conveyed; the plaintiff, as assignee, ratified the bargain made by the insolvent with *Clear*, and called upon the defendant for the proceeds, which,

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(a) See ss. 6 and 7.

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according to *Taylor v. Sir T. Plumer*, to the doctrine of which I fully accede, he was entitled to demand. The principle established in that case is, that, if an agent improperly conveys to another the property of his principal, the latter need not seek to recover the specific property; but, if he shew the party to be in possession of the proceeds, without disputing the right to the thing, he may sue for the proceeds. So, here, the plaintiff, as assignee, was entitled to the estate, and might confirm the sale and claim the proceeds. There is, consequently, no ground for a nonsuit. If the insolvent had an equitable interest in the estate before his imprisonment, he had a clear right to charge it with an equitable lien, and with the equitable set-off made against the plaintiff's claim. The insolvent had, at the time of his incarceration, the *jus disponendi*; and he agreed with the defendant, that, if the latter would lend him 40%, that sum, together with his bill, should be paid out of the proceeds of the sale of the estate, which was then contemplated. It has been ingeniously contended, on the part of the plaintiff, that a lien cannot exist upon a thing not in possession. Doubtless, that is so. But, if, before property comes into possession, such a bargain be made, the lien attaches, not from the time of making the bargain, but from the time that such property shall afterwards come into possession; as, if a person lend another a sum of money on the security of a homeward bound cargo, no lien can exist until the actual arrival of the ship; but, the moment it does arrive, the lien attaches. What passed between the defendant and the insolvent created no lien upon the property until the proceeds came into the hands of the defendant; but, from that moment, the proceeds were bound by the previous bargain. I am, therefore, of opinion, that the defendant had a lien upon the sum in his hands, for the amount of the bond, as also for what shall be found to be fairly and reasonably due to him on his bill for work done, as the in-

solvent, at the time of the contract, had a right to bind that fund. The rule for a nonsuit must, therefore, be discharged, and the rule for increasing the damages enlarged until an arbitrator has ascertained what sum is due to the defendant on the bill.

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Mr. Justice PARK.—The circumstances of the case of *Hepper v. Marshall* differ from those of the present; there, the property in question did not come into the possession of the insolvent until after his discharge; here, the insolvent was the equitable owner of the estate at the time of his arrest and imprisonment. He had sold other property to Lord *Hardwicke*, and, by mistake, this estate was included in the conveyance; and it was afterwards re-conveyed to the insolvent. Before it was so re-conveyed, *viz.* on the 15th *June*, 1822, the insolvent had entered into an agreement for the sale of it. He was then *sui juris*. He had a right to sell the property. Prior to that, he had borrowed money from the defendant, under a stipulation that the sum should be re-paid out of the purchase-money. The insolvent had then a right to charge the fund, and he thus created an equitable lien upon it. The defendant is, therefore, entitled to retain the sum secured by the bond, and also so much of his bill as an arbitrator shall award him.

Mr. Justice BURROUGH.—If the party had not become insolvent, and the sale had been effected under the same circumstances, the lien and set-off claimed by the defendant would unquestionably have been allowed. The assignee, therefore, can only take the property, or the proceeds of it, subject to the same equity, and to the bargain made between the parties.

Mr. Justice GASELEE.—This was not property acquired by the insolvent since his discharge, but property in which

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he before had an equitable estate; consequently, it passed to his assignee by the assignment. The distinction between the modes of assignment of the estate of a bankrupt, and that of an insolvent, is this—in the one case, it passes by bargain and sale and assignment; in the other, by assignment alone. In the case of bankruptcy, personal property passes by assignment; real property, by bargain and sale. The after-acquired property of an insolvent does not pass to his assignees by the assignment; but all that he had at the time of his discharge does pass. The insolvent here had an interest which passed by the assignment. The produce of the estate received by the defendant, was money had and received by him to the use of the assignee; but, subject to the equitable lien created thereon by the insolvent. The verdict, therefore, should be entered for the sum found by the Jury; but, as it was agreed at the trial, that the bill of costs should be referred to an arbitrator to ascertain the reasonableness of the charges, the rule for entering a nonsuit must be discharged, and the rule for increasing the damages must be suspended until the arbitrator has decided upon the sum which the defendant is entitled to retain, beyond the sum mentioned in the bond, for his bill of costs.

Rule (for a nonsuit) discharged.

Rule (to increase the damages) enlarged.

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Friday,
Feb. 5th.

RADENHURST v. BATES.

THIS was an action of *assumpsit*, for the breach of an agreement. The declaration stated—that, theretofore, to wit, on the 14th *February*, 1825, at *Birmingham*, in the county of *Warwick*, by a certain agreement in writing, then and there made by and between the plaintiff and defendant, together with one *George Cole*, one *Henry Wakefield*, one *John Scott*, and one *Thomas Emery*, it was declared, that they whose signatures and places of residence were at the foot of the said agreement subjoined, thereby mutually and reciprocally bound themselves each to the other, under the conditions and restrictions thereafter recited; that is to say—they agreed, in common accordance, forthwith to establish a stage-coach, to be worked or conveyed by them respectively, from *Birmingham* aforesaid, in the said county of *Warwick*, to *Liverpool*, and to be returned or conveyed over the same line of journey to *Birmingham*, in the manner and time of conveying the same as thereafter stated; each of them respectively thereby having described in writing, against their signatures severally, that part of the journey aforesaid which they and each of them agreed to horse and convey the said coach, and the time and manner of so doing; and they thereby mutually and reciprocally agreed each with the other, that such statement against their respective signatures should be part of that memorandum of agreement: then, for the better and more immediately carrying the object of that agreement into effect, they further mutually and reciprocally bound themselves each to the other, to the following stipulated forfeitures or penalties, ranged with the specific condition to the said agreement attached; and that such forfeitures or penalties respectively should, and they were thereby severally agreed to be paid as liquidated damages; and that the plaintiff should receive all and every of such forfeitures and penalties or penalty

Several persons jointly agreed to establish a stage-coach, each to horse it one stage. For carrying this agreement into effect, the parties bound themselves each to the other, to pay to the plaintiff, in case of default, certain penalties, for which he alone was to be empowered to sue; the amount of such penalties to be divided among all the parties to the agreement who should not have subjected themselves to any penalty, to the exclusion of the defaulter:—
Held, that the plaintiff alone might maintain an action for a breach of the agreement, and that the other parties need not join.

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that might accrue accordingly; and, in default of payment by any of the party or parties to the said agreement, that the plaintiff might, and he was thereby authorized and empowered by them mutually to sue out legal process for the same; and that the amount of such forfeiture, penalty, or penalties, should be divided amongst the parties to that agreement who should not have subjected themselves to any such forfeitures, penalty, or penalties, as aforesaid, to the exclusion of any and every defaulter, under the circumstances aforesaid, as to sharing in any part thereof: and it was thereby severally and conjointly agreed—first, that every party or person to the said agreement, who should not be ready, at the stipulated time of commencing, to work and convey the stage-coach intended to be established as aforesaid over that part of the journey that he thereby undertook and agreed to horse and convey the said coach, and did not horse and convey the same accordingly, should forfeit the sum of 50*l.*, to be recovered and applied as thereinbefore recited and stipulated: and it was thereby further mutually and reciprocally agreed, that such stage-coach or coaches should commence to be conveyed over the said journey, on *Monday*, the 21st of *March* then ensuing; that is, two coaches daily and every day, the one to leave *Birmingham*, and the other *Liverpool*; and that the said journey should be performed each way in thirteen hours and a half, the proportion of the said time assigned to each being attached in writing against the signature of each proprietor; and, in order to preserve the good faith indispensable to the well doing of the proprietors of the said coaches, it was mutually and reciprocally agreed by each with and to the other, that neither of them should, directly or indirectly, be concerned in, or promote the interest of, any other coach whatever, that might be worked from the two extremities, viz. *Birmingham* and *Liverpool*; but that their interest and best efforts should be applied to the coach then in contempla-

tion, and agreed to be established; and, for any and every violation of such good faith, the person or persons respectively should forfeit as a penalty, 200*l.*, to be recovered and applied as in such cases theretofore stipulated; and it was further mutually and reciprocally agreed by the parties to the said agreement, that there should be three coachmen and two guards employed on the said coaches; and it was further agreed by the parties, that, for officing the coach at each extremity, including stationery, books, lights, porters, and clerks, one guinea should be allowed at the *Birmingham*, and one guinea at the *Liverpool* end, weekly, and deducted from the earnings of the coach in accounts in progress; and it was further mutually and reciprocally agreed by the parties aforesaid, each with the other, that no party or person to the said agreement should cease to convey the said coach, or impede it on its journies, by not conveying or causing it to be conveyed over his proportion of the journey, agreeably to his undertaking, under the forfeiture of 100*l.*, liquidated damages, to be paid by him, to be applied in manner aforesaid; that is, in the understanding of coach phraseology, he should not take off his horses, unless he gave three months' notice in writing, previously, to the proprietors severally, of his intent so to do; and that all the penalties should, and it was severally agreed might, be retained by the plaintiff out of any money that might come to his hands on account of the person or persons subject to such penalty or penalties. The plaintiff then averred, that the signatures at the foot of the said agreement subjoined, and the several parts of the said journey which the parties signing the said agreement, and each of them, agreed to horse and convey the said coach, and which were described in writing against the signatures, were as follow:—that is to say—*Charles Radenhurst* (the plaintiff), from *Birmingham* to *Wolverhampton*; *George Cole*, from *Wolverhampton* to *Stafford*; *Henry Wakefield*, from *Stafford*, twenty miles further to-

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wards *Liverpool*; *John Scott*, the ground from *Liverpool* to *Northwich*; *Thomas Emery*, from *Sandbach* to *Northwich*, eleven and a half miles, and back; *M. Bates* (the defendant), fourteen miles, from *Hanley* to *Sandbach*, and back, and two hours to work the same. And, the said agreement being so made, afterwards, to wit, on &c., at &c., in consideration thereof, and that the plaintiff, at the special instance and request of the defendant, had then and there undertaken, and faithfully promised the defendant, to perform and fulfil the said agreement in all things on his part and behalf to be performed and fulfilled, the defendant undertook, and then and there faithfully promised the plaintiff, to perform and fulfil the said agreement in all things on his part and behalf to be performed and fulfilled. It was then averred, that, afterwards, to wit, on &c., at &c., it was stipulated and agreed by and between the said parties to the said agreement, that the time for commencing to work and convey the said coach over that part of the said journey over which the defendant so undertook and agreed to horse and convey the said coach, should be the 21st of *March*, in the year aforesaid; and that, afterwards, to wit, on &c., the said stage-coach, on its said journey from *Birmingham* to *Liverpool*, arrived at *Hanley* aforesaid, for the purpose of being then conveyed by the defendant to *Sandbach* aforesaid, being his proportion of the said journey, as in the said agreement mentioned, to wit, at &c.; and that the defendant was then and there duly required to convey the said stage-coach from *Hanley* aforesaid to *Sandbach* aforesaid, accordingly; yet that the defendant, not regarding the said agreement, nor his aforesaid promise and undertaking, was not ready, at such stipulated time, to convey, nor did nor would, when so required, convey the said coach from *Hanley* aforesaid to *Sandbach* aforesaid, but then and there wholly refused so to do, contrary to the tenor and effect of the said agreement, and of his aforesaid promise and undertaking: by means of which said several premises, the defendant, after-

wards, to wit, on &c., at &c., became liable to pay to the plaintiff the said forfeiture of 50*l.*, liquidated damages, to be applied in manner in the said agreement mentioned, when he should be thereto afterwards requested.

There was a further breach charging the defendant with promoting the interests of another coach.

Mr. Serjeant *Vaughan*, on a former day in this term, obtained a rule calling on the plaintiff to shew cause why the judgment should not be arrested, on the grounds—*First*, that the agreement upon which the action was brought constituted a partnership between all the parties to it, and could not be made the subject of an action at law; but that, for any breach of it, the parties must seek their remedy in equity—*Secondly*, that, supposing an action at law to be maintainable, all the contracting parties among whom the penalties were to be divided, should have been joined—*Thirdly*, that there was no mutuality in the agreement; for that, if the plaintiff incurred a penalty, he could not sue himself—*Fourthly*, that, the consideration for the defendant's promise was not truly alleged in the declaration—the consideration appearing upon the record, being, that *the plaintiff* had undertaken, and faithfully promised the defendant, to perform and fulfil the agreement in all things on his part and behalf to be performed and fulfilled; whilst that disclosed upon the face of the agreement set forth in the declaration was, that *all* the parties to the agreement mutually and reciprocally bound themselves each to the other for its due performance: there being no averment of performance by *all* the parties.

Mr. Serjeant *Taddy* and Mr. Serjeant *Adams* shewed cause.—If the consideration be well stated in the declaration, the plaintiff alone can maintain this action. Each of the parties agrees to be severally liable to all the rest, and

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one is empowered to sue. If the plaintiff was entitled to sue at all, he could not have declared otherwise than he has done. There is nothing in law to render void an agreement that one shall sue where several have an interest. The clear intent of this agreement was, that the plaintiff alone should sue for and receive the penalties incurred by any default, and that the amount of such penalties should be divided amongst such of the parties as had not made default. It is by this mode only that the parties could guard against the possibility of one releasing the default of another, and thus prevent the others from enforcing the agreement. Throughout the whole of the agreement the words are, that the parties thereby "mutually and reciprocally agree each with the *other*," not "*others*." The whole object of the agreement was in its nature several; each party was to convey the coach a given distance; the plaintiff alone was to judge who were defaulters; he alone was to sue; and he was to divide the penalties recovered amongst the other parties: they all consent to vest the powers in one. In *Barton v. Hanson* (a), it was held, that, if several persons horse, with horses their several property, the several stages of a coach, in the general profits of which they are partners, they are not all jointly liable for goods furnished to one partner for the use of the horses drawing the coach along his part of the road. In *Fromont v. Coupland* (b), the parties horsing a coach for different parts of the line of road upon which it travelled, and participating jointly in the profits, were held to be partners. Here, however, the question depends upon the construction of the agreement; and, although the agreement by the parties, that one should be empowered to sue for the others, in his own name, would not avail as against strangers, yet there is nothing illegal in such a stipulation amongst the parties themselves; they

(a) 2 Taunt. 49.

(b) 9 B. Moore, 319; S. C. 2 Bing. 170.

cannot avoid their agreement. In *Davies v. Hawkins* (a), the action was brought upon an agreement by which a number of persons subscribed together, and formed themselves into a company for brewing ale, and entered into a deed, by which it was agreed that the conduct of the business should be confided to two persons, and the trade carried on in their names, and that they should be trustees for the company so far that *the right of action* for goods delivered, *should be in them*, and all actions be brought *in their names*. The plaintiff there was nonsuited; but that was upon the ground of a defect in his appointment as trustee under the deed; the legality of the agreement itself was not questioned. In *Owston v. Ogle* (b), the part owners of a ship agreed, "each and every of them with the other and each and every of the others," that the ship should proceed on a certain voyage, under the exclusive management and control of one of them as ship's husband, and that, after her return, "a full account should be made of the said ship and her concerns," and the net profits be divided in proportions, after deducting all charges—it was held, that the duty of making out such accounts was cast upon the ship's husband, and that, for not doing so, and for omitting to divide the net profit, after deducting all charges, within a reasonable time after the ship's return, an action lay against him upon the agreement, by each of the part owners. Lord *Ellenborough* there said (c): "Each of the adventurers was to receive from the ship's husband the account of the ship's proceedings, what had been disbursed, and what she had earned, in order that he might have the means of ascertaining the amount of his own share. Is it not, then, reasonable that the covenant to account should be several? There could, indeed, be no account of the net profits, nor could any division of the net profits be made, un-

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(a) 3 Mau. & Sel. 488.

(b) 13 East, 538.

(c) *Ib.* 541.

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til the period arrived when the charges and gains of the voyage were ascertained; but, before that division was to be made, each would be entitled to have an account: and, whether usual or not, it is very reasonable that he should. The object of the covenant seems to have been, to prevent a suit in equity." That case is far stronger than the present; for, there, the instrument was not under seal. The principle established by all the authorities is, that an agreement like the present, whether by deed or by parol only, is not illegal.

The averment that the coach arrived at *Hanley*, for the purpose of being conveyed by the defendant to *Sandbach*, is, after verdict, a sufficient allegation of the performance of the agreement on the part of the plaintiff. In *Mountford v. Horton* (a), a declaration in *assumpsit*, stating an agreement between two parties, omitted the mutual promises—it was held, on motion in arrest of judgment, that the agreement imported a promise.

Mr. Serjeant *Vaughan*, in support of his rule.—The nature of the agreement in this case substantially recognizes this to have been a partnership transaction. The terms of the agreement, and the character of the engagements entered into by the parties, necessarily import a partnership. The consideration is not truly set forth in the declaration. If even the agreement, that one should be empowered to sue for breaches committed by the others, be valid, the plaintiff has not declared properly. According to the principle established in *Clarke v. Gray* (b), the entire consideration for the act, and the entire act or duty which is to be done in virtue of such consideration, the breach of which act of duty is complained of, must be truly set forth. What, in this case, is the consideration for the defendant's promise? That the other four parties

(a) 2 New Rep. 62

(b) 6 East, 564.

shall horse the coach for their respective portions of the journey. It should have been averred, too, that the coach arrived at *Hanley* at its appointed time. Besides, there is no mutuality in the agreement. The plaintiff cannot be sued in respect of any default committed by himself; for he is the party appointed to sue for all defaults. He cannot sue himself; and, in case of his death, the right to sue would not pass to his representatives. The case of *Owston v. Ogle* is distinguishable, as there the contract was a several, and not a joint contract.

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Lord Chief Justice BEST now delivered the judgment of the Court. After reading the declaration, his Lordship proceeded as follows:—

In this case, a motion has been made in arrest of judgment, upon several objections that have been taken to the declaration.

First, it has been insisted, that this agreement makes the parties to it partners, and, therefore, that, if any of them have claims against the others, they must go into a Court of equity.

That which is sought to be recovered in this action is not partnership property, neither are the plaintiff and defendant tenants in common; the defendant has no interest whatever in it. It is a penalty to be paid by the defendant to the plaintiff, for the use of the other contracting parties, the defendant himself being, by the terms of the agreement, expressly excluded from any share in it. There are no accounts to be settled before this claim can be decided, and, therefore, there is no reason why the case should not be disposed of in a Court of law, or why the parties should be subjected to the delay and expense attending proceedings in equity. Courts of law should be careful not to narrow their jurisdiction. Whenever justice can be attained in a Court of law, a suit should be prosecuted

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there, in preference to driving the parties to their equitable rights.

Secondly, it has been contended, that all the contracting parties amongst whom the penalties are to be divided, should have joined in the action.

The members of a firm cannot, by agreement, authorize one of their number to bring actions in his name against persons who are not members; but, where several parties, by agreement, create penalties to be paid by one of them to the others, we see no difficulty in their empowering one to sue for the others. Such an agreement is, in effect, an undertaking not to object, that all who otherwise ought to have been joined in the action, are not joined. If this ground of objection were tenable, it might have been taken in *Davies v. Hawkins*; but it was not noticed there either by the bar or by the bench. Corporations frequently make bye-laws, imposing penalties upon their members, and directing that those penalties shall be recovered in actions brought by the head of the corporation, for the use of the corporation; and, according to the case of the *Felt-makers' Company v. Davis* (a), and the authorities there cited, such actions are properly brought in the name of the head of the corporation. The right to maintain actions by corporations, is founded upon an agreement between the members, as in the present case.

The *third* objection is, that there is no mutuality in the agreement; for, that, if the plaintiff incurred a penalty, he could not sue himself.

That is a case not provided for by the agreement, and, therefore, all the other contracting parties who had incurred no penalty, must join in the action against him; they would thus obtain equal redress, though not precisely in the same manner. Where an act of Parliament directs that a company shall sue and be sued in the name

(a) 1 Bos. & Pul. 98.

of their treasurer or clerk, and he has a claim against them for wages, he cannot sue himself, but must, notwithstanding the provision in the act, sue the company.

The next objection is, that the consideration for the defendant's promise is not correctly set out in the declaration.

It is contended, that it should have been stated, that, in consideration of *all* the other contracting parties having promised to fulfil the agreement on *their* parts, he, the defendant, promised to fulfil the agreement on *his* part; and not, as stated in the declaration, in consideration that *the plaintiff* promised to fulfil *his* part of the agreement. But the agreement itself is set out in the declaration, and it is stated, that, in consideration of the premises, the defendant undertook. We think that this is sufficient, and that the other allegation is surplusage.

The *last* objection is, that it is not averred in the declaration, that the plaintiff, or the other contracting parties, performed their part of the agreement.

It is, however, stated, that the coach was brought to *Hanley*, from *Sandbach*, that being the place at which the defendant's proportion of the journey was to commence. This is the only thing that looks like a condition precedent to the performance of the defendant's duty; but, although it may not be averred with strict precision, we think that it cannot be objected to after verdict. The plaintiff, therefore, is entitled to recover the 50%.

With respect to the 200% penalty for supporting the interests of another coach, there was no condition precedent to be performed by the plaintiff before he could recover that penalty; and, therefore, we think, that, after verdict, no objection can prevail against the plaintiff's right to recover that penalty also, by reason of the want of an averment of the performance of any duty.

Rule discharged.

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In *assumpsit*, on a bill of exchange, the defendant pleaded in bar, his bankruptcy and certificate. The commission issued on the 29th January, and the certificate under it bore date the 5th November, 1825 :—*Held*, that the certificate did not require enrolment under the 5 Geo. 4, c. 98, that statute having been repealed before the certificate was obtained; nor under the 6 Geo. 4, c. 16, the 96th section of that act, which requires the enrolment, applying only to commissions issued after the act had taken effect.

A promise by a bankrupt to deliver goods in satisfaction of a debt due by him before his bankruptcy, is not such a promise to pay the debt, as will revive it after certificate.

TATTLE v. GRIMWOOD.

THIS was an action of *assumpsit*, on a bill of exchange, dated the 5th October, 1824, indorsed by the defendant to the plaintiff; and also for goods sold and delivered.

The defendant pleaded—*First, non assumpsit*—*Secondly*, that, on the 29th January, 1825, he, the defendant, became bankrupt, and that the plaintiff's cause of action, if any, accrued before the bankruptcy.

At the trial, before Lord Chief Justice *Best*, at the Sittings at *Westminster*, after the last Term, the defendant, in support of his second plea, offered in evidence his certificate, bearing date the 5th November, 1825, obtained under a commission of bankruptcy issued against him on the 29th January preceding.

It was objected, on the part of the plaintiff, that this certificate could not be received in evidence, it not having been enrolled or entered of record, in pursuance of the statute, 5 Geo. 4, c. 98, s. 92.

His Lordship thought there was no weight in the objection, and, therefore, allowed the certificate to be put in.

Evidence was then offered of a parol promise to pay, by the defendant, subsequently to his bankruptcy and certificate. The promise was, not to pay the debt in *money*, but to give bricks in satisfaction.

The Lord Chief Justice thought, that a subsequent promise, to be binding on the bankrupt, should be in writing; but he left it to the Jury to say, whether or not there had been any promise to pay, telling them that the promise to deliver goods in satisfaction was not sufficient.

The Jury returned a verdict for the defendant.

Mr. Serjeant *Taddy*, on a former day in this Term, applied for a rule *nisi*, that this verdict might be set aside,

and a new trial had, on the objection taken at the trial, as to the non-enrolment of the certificate. He also submitted that there was sufficient evidence to warrant the Jury in finding a general promise to pay; and that the promise to deliver bricks had reference to the former claim, and created no new cause of action, but was only an undertaking to perform the original one—promising to pay, and specifying the mode of payment.

The Court granted the rule upon the first point only; and held, that the mere promise to give goods in satisfaction, was not a sufficient promise to pay, to revive the debt. Mr. Justice *Gaselee* referred to a case tried in *Cornwall*, where the question was, whether a promise to deliver coals in satisfaction of a debt, was sufficient to take the case out of the operation of the statute of limitations—the Court of *King's Bench* held that it was not.

Mr. Serjeant *Wilde* now shewed cause.—The statute 5 Geo. 4, c. 98, which repealed all the previous statutes concerning bankrupts, was passed on the 21st June, 1824. The 92nd section (a) enacts, that no commission of bankruptcy, adjudication of bankruptcy, &c., or certificate of

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(a) By which it was enacted—
“That, in all commissions to be issued after the passing of the act, no commission of bankruptcy, adjudication of bankruptcy by the commissioners' certificate, or declaration of choice of assignees, or certificate of conformity, should be received as evidence in any Court of law or equity, unless the same should have been first entered of record; and that the Lord Chancellor might, upon petition, direct any depositions, proceedings, or other matter relating to commissions of bankruptcy, to

be entered of record as aforesaid; and all persons should be at liberty to search for any of the matters so entered of record as aforesaid: provided that, on the production in evidence of any instrument so directed to be entered of record, having the certificate thereon, purporting to be signed by the person so appointed to enter the same, or by his deputy, the same should, without any proof of such signature, be received as evidence of such instrument having been so entered of record as aforesaid.”

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conformity, shall be received as evidence, unless entered of record. The 117th section (a) enacts, that every bankrupt who shall have duly surrendered, &c., shall be discharged from all debts, &c., made proveable under the commission, on obtaining a certificate of conformity. The 123rd section (b) provides, that, if the bankrupt be sued, after the allowance of his certificate, for any debt due by him before his bankruptcy, he may plead in general, that the cause of action accrued before he became bankrupt, and may give the act and the special matter in evidence; and the 138rd section enacts, that the act shall not come into operation until the 1st *May*, 1825, except as to such enactments as relate to certificates; which were to take effect upon the passing of the act. The 136th section (c) of the statute 6 *Geo.* 4, c. 16, which was passed on the 2nd *May*, 1825, repeals from that day the 5 *Geo.* 4, c. 98. The 96th

(a) By which it was enacted—
 “That every bankrupt who should have duly surrendered, and in all things conformed himself to the laws in force concerning bankrupts, at the time of issuing the commission against him, should be discharged from all debts due by him when he became bankrupt, and from all claims and demands thereby made proveable under the commission, in case he should obtain a certificate of such conformity, so signed and allowed, and subject to such provisions as thereafter directed.”

(b) By which it was enacted—
 “That any bankrupt who should, after his certificate should have been allowed, be arrested, or have any action brought against him, for any debt due by him before his bankruptcy, should be

discharged upon common bail, and might plead in general, that the cause of action accrued before he became bankrupt, and might give the act and the special matter in evidence; and such bankrupt's certificate, and the allowance thereof, should be sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining such certificate.”

(c) By which it is enacted—
 “That this act shall not take effect before the *first* of *September*, 1825, save and except that the repeal of the act passed in the fifth year of the reign of his present Majesty, hereby repealed, and all enactments herein contained relating to certificates of conformity, shall take effect upon the passing of this act.”

section (a) of the 6 Geo. 4, c. 16, which also requires the enrolment of certificates, applies only to commissions issued *after* that act had taken effect; and the 135th section (b) provides "that nothing therein contained shall alter the present practice in bankruptcy, except where any such alteration is expressly declared." The defendant not having obtained his certificate until *November*, 1825, it could not have been enrolled under the 5 Geo. 4, c. 98, for, that statute was repealed on the 2nd *May* preceding; neither could it have been enrolled under the 6 Geo. 4, c. 16, the commission on which it was founded having been issued *before* the passing of that act. By the repeal of the 5 Geo. 4, c. 98, the old statutes were revived, as the repeal of a repealing statute sets up the acts repealed by it. In its general enactments, the 6 Geo. 4 was prospective; and the old statutes continued in force until the 1st *September*, 1825, except as to those enactments which related to certificates, as to which the former laws were repealed *instantly*.

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(a) By which it is enacted—
"That in all commissions issued *after this act shall have taken effect*, no commission of bankruptcy, adjudication of bankruptcy by the commissioners, or assignment of the personal estate of the bankrupt, or certificate of conformity, shall be received in evidence in any Court of law or equity, unless the same shall have been first so entered of record, as aforesaid; and every such instrument shall be so entered of record upon the application of, or on behalf of, any party interested therein, without any petition in writing presented for that purpose."

(b) By which it is enacted—
"That this act shall be construed

beneficially for creditors; and that nothing herein contained shall alter the present practice in bankruptcy, except where any such alteration is expressly declared; and that nothing herein contained shall render invalid any commission of bankruptcy now subsisting, or which shall be subsisting at the time this act shall take effect, or any proceedings which may have been had thereunder, or affect or lessen any right, claim, demand, or remedy, which any person now has thereunder, or upon or against any bankrupt against whom any commission has or shall have issued, except as is herein specifically enacted."

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Mr. Serjeant *Taddy*, in support of his rule.—By the operation of the 6 Geo. 4, c. 16, the former statutes relating to bankruptcy could only be in force on the repeal of the 5 Geo. 4, c. 98, *vis.* from the 2nd *May*, to the 1st *September*, 1825. Here, the commission issued on the 29th *January*, 1825, and the certificate under it was obtained on the 5th *November* following; the old statutes, therefore, could not apply to this case. The 6 Geo. 4, c. 16 applies only to certificates under commissions issuing *after* the passing of that act. The 5 Geo. 4, c. 98, was the only act in force at the time this commission issued; therefore, that act only can apply; and that required the enrolment of the certificate.

Cur. adv. vult.

Lord Chief Justice BEST now delivered the judgment of the Court.

This was an action on a bill of exchange, dated the 5th *October*, 1824, indorsed by the defendant to the plaintiff. The defendant has pleaded—*first*, the general issue—*secondly*, that a commission of bankrupt was issued against him, bearing date the 29th *January*, 1825, and that the plaintiff's causes of action, if any, accrued before he became bankrupt. In support of this plea, a certificate, duly allowed, dated the 5th *November*, 1825, was offered in evidence. It was objected by the counsel for the plaintiff, that this certificate could not be received, it not having been enrolled or entered of record, in pursuance of the statute 5 Geo. 4, c. 98, s. 92.

When this objection was first presented to me at *Nisi Prius*, I was apprehensive that the defendant might be deprived of the protection which the bankrupt laws were intended to afford to honest but unfortunate traders; and that commissions of bankrupt issued after the repeal of the statute 5 Geo. 4, c. 98, and before the day when the statute 6 Geo. 4, c. 16 was to take effect, might be invalid.

Before, however, the cause was terminated, I felt perfectly satisfied that there was nothing in the objection, and I, therefore, received the certificate in evidence, without reserving the point for the consideration of the Court.

A motion has since been made for a new trial, on the ground that the certificate, not having been enrolled, was not admissible in evidence. My brother *Burrough* and my brother *Gaselee* both agree with me, that there is no pretence for the motion: my brother *Park* was, unfortunately, prevented by indisposition from hearing the argument.

It is a settled rule of law, that, if an act of Parliament, which repeals former statutes, be repealed by an act which contains in it nothing that manifests the intention of the Legislature that the former laws shall continue repealed, the former laws will, by implication, be revived by the repeal of the repealing statute. This rule is established by the resolutions of the Judges in the House of Lords, in the case concerning Bishops, which I mentioned at the trial (a).

By the first section of the 5 *Geo.* 4, c. 98, all the bankrupt acts, from the 34 & 35 *Hen.* 8, c. 4, to the 3 *Geo.* 4, c. 81 inclusive, are repealed. By the last section of the statute 5 *Geo.* 4, none of the enactments (except such as relate to certificates of persons becoming bankrupts before the act passed, or who should become bankrupts before the 1st *May*, 1825) are to take effect before the 1st *May*, 1825. The former bankrupt laws, therefore, were not repealed by the 5 *Geo.* 4, until the 1st *May*, 1825.

The statute 6 *Geo.* 4, c. 16, passed on the 2nd *May*, 1825. On the 1st of *May*, by the operation of the 5 *Geo.* 4, all the old bankrupt laws were repealed, and the 5 *Geo.* 4 was the only act in force. The 5 *Geo.* 4 was, by the 136th section of the 6 *Geo.* 4, repealed on the 2nd of *May*, having been in force one day only, *viz.* from the 1st to the 2nd of *May*. This put an end to the necessity of re-

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(a) *Spencer's Case* (15 *Edw.* 3), 12 *Rep.* 7.

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gistering certificates under that act. But the repeal of the 5 Geo. 4, according to the rule established by the case in 12 *Coke*, revived all the old statutes; for, although all these statutes are again repealed by the 1st section of the 6 Geo. 4, which would prevent their revival by implication by the repeal of the repealing statute, yet the 136th section prevented the 1st section from repealing them, until the day when the 6 Geo. 4 was generally to take effect, *vis.* the 1st of *September*, 1825. From the 2nd of *May* until the 1st of *September*, therefore, the old statutes were revived, and were in force, by the repeal of the 5 Geo. 4, on the 2nd of *May*. On the 1st of *September*, 1825, the 6 Geo. 4 came into full operation, and the 5 Geo. 4 was not completely got rid of until then.

The certificate in this case is dated the 5th *November*, 1825; and the commission issued on the 29th *January* preceding. Now, the 96th section of the 6 Geo. 4, which prevents certificates not registered from being received in evidence, applies only to commissions issued *after the passing (a) of that act*. This commission issued *before* the passing of that act; and the certificate under it is not affected by the clause relating to certificates.

The 92nd section of the 5 Geo. 4 enacts, that, "in all commissions to be issued after the passing of that act, no commission of bankruptcy, adjudication of bankruptcy by the commissioners' certificate, or declaration of choice of assignees, or *certificate of conformity*, shall be received as evidence in any Court of law or equity, unless the same shall have been first entered of record." But, although this commission issued after the passing of that act, it was sued out before the act took effect, and in virtue of the old statutes, which, at the time of the issuing of this commission, were in full force. Besides, before this certificate was allowed or signed, the 5 Geo. 4 was completely re-

(a) The words of the clause are, "after this act shall have *taken effect*."

pealed; and, therefore, the 92nd section of that act cannot affect this case. It has been said, that statutes, in all other respects repealed, are sometimes kept in force as to bye-gone transactions; but there is no clause of this sort in the 6 *Geo.* 4; and, therefore, the 5 *Geo.* 4 has no more effect in this case than if it had never existed. It has also been said, that the words of the 136th section—that “all enactments therein contained relating to certificates of conformity, shall take effect upon the passing of the act”—bring into immediate operation so much of the 96th section as prevents certificates from being received in evidence, which are not duly registered, immediately after the 2nd *May*, 1825. This cannot be the true construction; for, the 96th section is, in terms, confined to commissions issued *after the first day of September*, the day on which the act took effect. Such a construction would not only make the different sections of the act inconsistent with each other, but would produce this absurd consequence—that certificates of conformity, in commissions issued before the 1st of *September*, must be registered, although the act does not require the registration of such commissions, or of any other proceedings under such commissions. The words quoted from the 136th section, refer to the 121st and 122nd sections, which give to bankrupts the benefit of certificates, and direct how they shall be signed and allowed, and not to that which prevents certificates from being given in evidence.

The manner in which the first of these acts dealt with the previous statutes, and the last of them has dealt with the first, and with all the previous laws relating to bankrupts, has occasioned no small difficulty; but the decision we have come to renders the different parts of these acts consistent.

We are of opinion that the rule for a new trial must be—

Discharged.

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In trespass for false imprisonment, the *onus* of justifying rests on the defendant. Therefore, in trespass for causing the plaintiff to be apprehended under a Justice's warrant:—
Held, that the plaintiff might maintain the action without producing the warrant.

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THIS was an action of trespass for an assault and false imprisonment. The declaration was in the common form.

At the trial, before Mr. Justice *Bayley*, at the last Assizes at *York*, it appeared that the plaintiff, who was a servant of the defendant, had been apprehended for having abandoned his work. The deputy constable, by whom the plaintiff was arrested, proved that he had received from the chief constable a warrant against the plaintiff. This warrant was not produced; but, in order to shew that the defendant was the person who caused the plaintiff to be apprehended under it, the constable stated that, when he was proceeding to execute the warrant, the defendant desired him to make haste; and the mother of the plaintiff also proved, that, on the following day, she called at the defendant's house, to inquire for her son, when the defendant said that he had sent him to prison. The plaintiff was subsequently examined before a magistrate, and discharged (a).

It was contended, on the part of the defendant, that, inasmuch as the case had been opened for the plaintiff as the case of an imprisonment under an illegal warrant, it was incumbent on him to produce the warrant.

The learned Judge was of opinion that the production of the warrant was not necessary to entitle the plaintiff to maintain the action.

The Jury returned a verdict for the plaintiff—damages

(a) If a magistrate's warrant be shewn by the constable who has the execution of it, to the person charged with an offence, and he thereupon, without compulsion, attend the constable to the magis-

trate, and, after examination, be dismissed; it seems that this is not such an arrest as will support an action of trespass for false imprisonment. *Arrowsmith v. Le Mesurier*, 2 New Rep. 211.

15*l.*; and leave was reserved to the defendant to move to enter a nonsuit, if the Court should be of opinion that the warrant ought to have been produced.

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Mr. Serjeant *Wilde*, on a former day in this Term, obtained a rule *nisi*, that this verdict might be set aside, and a nonsuit entered, on the grounds—*First*, that the warrant under which the defendant was alleged to have caused the plaintiff to be apprehended, should have been produced, that being the substantial cause of action—*Secondly*, that the plaintiff had misconceived his remedy, for that the action should have been case, for maliciously causing the warrant to be issued, and not trespass (*a*). The learned Serjeant referred to the case of *Morgan v. Hughes* (*b*), where, for false imprisonment, the distinction between case and trespass is thus laid down—where the immediate act of imprisonment proceeds from the defendant, the action must be trespass; but, where the act of imprisonment by one person is in consequence of information from another, there an action on the case is the proper remedy: and *Stonehouse v. Elliott* (*c*), where the distinction between the two forms of action laid down in *Morgan v. Hughes*, was recognized.

Mr. Serjeant *Spankie* was now about to shew cause, but the Court called on—

Mr. Serjeant *Wilde* to support his rule.—The defendant was not a trespasser; he only put the law in motion;

(*a*) In *Boot v. Cooper*, (1 Term Rep. 535, n.), it was held, that trespass does not lie against excise officers, for entering into a person's house, by virtue of a legal warrant, to search for smuggled goods; although none were

found therein: but that the only remedy was by an action on the case for maliciously obtaining or executing the warrant.

(*b*) 2 Term Rep. 225. And see *Massey v. Johnson*, 12 East, 67.

(*c*) 6 Term Rep. 315.

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and, if even he had no probable cause for procuring the apprehension of the plaintiff, the form of action should have been different; he cannot be liable in trespass. The arrest of the defendant was made by virtue of a warrant; and the conversations with the defendant, spoken of by the witnesses, had reference to an imprisonment under the warrant; and therefore the warrant should have been produced.

Lord Chief Justice BEST.—I am of opinion that the impression of the learned Judge at the trial was correct; but, as he reserved the question for our consideration, we thought it right to grant the rule. Where a man deprives another of his liberty, the injured party is entitled to maintain an action for false imprisonment, and it is for the defendant to justify his proceeding, by shewing that he had legal authority for doing that which he had done. The *onus* of justification in this case being upon the defendant, the warrant, if any existed, should have been produced by him. The mere assertion of the constable, that he had apprehended the plaintiff under a warrant, was not sufficient evidence of the issuing of a warrant. That which the constable called a warrant, might have been a mere piece of waste paper; and there is nothing to shew that it was issued by a person having competent jurisdiction, or that the plaintiff had been guilty of any offence of which a magistrate could take cognisance. It was clearly not the duty of the plaintiff to produce the warrant. His right of action accrued on his detention, and no evidence was offered by the defendant to repel it.

As to the objection that the action should have been case and not trespass, I am of opinion, that, the warrant not having been produced, it was impossible for the learned Judge who tried the cause, to say whether or not the action was commenced in the proper form.

The rest of the Court concurring—

Rule discharged (a).

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(a) See *Wickes v. Clutterbuck* (*ante*, Vol. 10, p. 63), where it was held, that an action of trespass for false imprisonment, was maintainable against the defendant, a magistrate, for causing the plaintiff to be apprehended under an erroneous commitment upon a regular conviction. And Lord Chief Justice *Best* there said (p. 89), that “in trespass, there can be no accessories, but all the parties

trespassing are to be considered as principals; as, if an order be unlawful, he who makes it is equally responsible with him who executes it: for, in *Rolle's Abridgment* (Vol. 2, tit. “*Trespass*,” V. 2, p. 555), it is laid down, that ‘if a man command another to beat one, and he do it accordingly, he is a trespasser, as well as he who did it.’”

DENMAN, Demandant; BULL, Tenant.

THIS was a writ of entry. The demandant took the record down for trial, under a peremptory undertaking, at the last *Summer* Assizes. The cause was entered late in the list, and, in consequence of an unusual press of business, it was made a *remanet* to the last *Spring* Assizes, when the tenant appeared, but no notice of trial had been given, and the demandant had not entered the cause for trial.

Mr. Serjeant *Taddy*, on a former day in this term, obtained a rule *nisi*, for judgment as in case of a nonsuit.

Mr. Serjeant *Lawes* now shewed cause.—There was no default on the part of the demandant; for, as he had not given notice of trial for the *Spring* Assizes, he was not in a situation to enter the cause. Where a cause has once been carried down to trial, the defendant cannot have judgment as in case of a nonsuit. In *Mewburn v. Lang-*

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In a writ of entry, the demandant took the record down to the Assizes. The cause was made a *remanet*. At the next Assizes, the tenant alone appeared.—The Court refused to allow him to sign judgment as in case of a nonsuit.

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ley (a), where the plaintiff had carried the record down for trial once, the Court refused to allow the defendant to enter up judgment as in case of a nonsuit, for not carrying it down a second time, although the cause was made a *remanet* the first time; but they said, that the defendant should have carried the record down by proviso. Besides, judgment as in case of a nonsuit can only be entered in those cases where the statute (14 Geo. 2, c. 17) enables a defendant to carry down the record by proviso, and that statute does not apply to real actions.

Per Curiam.—It is unnecessary to decide whether or not the statute 14 Geo. 2 applies to real actions (*b*). The case of *Mewburn v. Langley* appears to be in point. It was there held, that, if a plaintiff takes his cause down to the Assizes for trial, and it be made a *remanet*, although he withdraws the record at the next Assizes, the defendant cannot have judgment as in case of a nonsuit, but must carry down the record by proviso (*c*). In the case of *King v. Pippett (d)*, it was held, that judgment as in case of a nonsuit cannot be entered on the plaintiff's neglecting to carry the record down to trial, where the defendant might have carried it down by proviso. Whether, therefore, a writ of entry be or be not within the statute 14 Geo. 2, as the tenant might have carried down the record by proviso, he is not entitled to enter judgment as in case of a nonsuit.

Rule discharged (*e*).

(*a*) 3 Term Rep. 1.

(*b*) From the case of *Almgill v. Pierson* (1 Bos. & Pul. 103), it would seem that judgment as in case of a nonsuit *may* be entered up against the demandant in a writ of right.

(*c*) See also *Porzelius v. Maddocks*, 1 H. Blac. 101; *Anderson v. Shaw*, ante, p. 44.

(*d*) 1 Term Rep. 492.

(*e*) Where the defendant carries down the record by proviso, it is sufficient if he obtain the usual rule for trial by proviso at any time before trial, even though it be obtained after he has given the plaintiff notice of trial. *King v. Pippett*, 1 Term Rep. 695.

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DORRINGTON v. BRICKNELL.

THIS was a demurrer to a declaration in debt on a bail-bond, for not averring that there was any affidavit of debt, or that the writ was marked or indorsed for bail.

In debt on a bail-bond, the declaration need not contain averments that there was an affidavit of debt, or that the sum sworn to was indorsed on the writ.

Mr. Serjeant *Taddy*, in support of the demurrer.—The declaration is insufficient, on two grounds—*First*, it is not alleged that the writ under which the party was arrested, was issued on an affidavit of debt; *Secondly*, it is not stated that the writ was indorsed for bail: both of which averments are necessary by the statute 12th Geo. 1, c. 29, s. 2, (a). The objection was taken in the case of *Whiskard v. Wilder* (b), and over-ruled by the Court, Mr. Justice *Denison* saying: “It is often done, and often not: I have often seen declarations of both sorts; some one way, some the other.” But, in the subsequent case of *Hill v. Heale*, on *Whiskard v. Wilder* being referred to, Sir *James Mansfield* said (c): “The question there related to the form of the declaration. Mr. Justice *Denison*, who was a pleader of the first eminence, observed, that, in practice, the form of the declaration was sometimes one way, and sometimes another; and that he

(a) By which it is enacted—“That, from and after the 24th June, 1726, in all cases where the plaintiff’s cause of action shall amount to *ten* pounds, or upwards, affidavit *shall be* made and filed of such cause of action, (which affidavit may be made before any Judge, or commissioner of the Court out of which such process shall issue, authorized to take affidavits in such Courts, or else before the officer who shall

issue such process, or his deputy, which oath such officer or his deputy, is thereby empowered to administer); and that, for such affidavit, one shilling, over and above the stamp-duties, shall be paid, and no more; and that the sum or sums specified in such affidavit *shall be* indorsed on the back of such writ or process.”

(b) 1 Burr. 330.

(c) 2 New Rep. 201.

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did not think the averment necessary. This was the sole question before the Court. But I should have great difficulty in agreeing with the doctrine imputed to the Court of *King's Bench*, that the statute of 12 Geo. 1, is merely *directory*; I cannot help entertaining great doubts respecting that *dictum*. The Sheriff must see by the writ whether it be indorsed or not, and I cannot think he could justify an arrest without it." So, here, the arrest could not be justified without an affidavit of debt, and no action can be maintained on a bond given to enforce an illegal arrest. The bail-bond is founded on the arrest; and, if the arrest be ill, the bail-bond is bad also.

Mr. Serjeant *Peake* (in the absence of Mr. Serjeant *Wilde*), *contra*, was stopped by the Court.

Mr. Justice PARK (a).—I am of opinion that there is no foundation for the objections that have been raised to the form of the declaration in this case. *Whiskard v. Wilder* was decided in the year 1757, and its authority has never since been questioned. The case of *Hill v. Heale* is of a totally different nature. The question there was, whether a commission of bankrupt sued out upon the affidavits of four petitioning creditors, whose debts did not appear upon the face of the affidavits to amount to 200*l.*, was void—it was held not; the provision in the 5 Geo. 2, c. 30, s. 23, respecting such affidavits, being *directory* only, and not conditional. What Sir *James Mansfield* there said with respect to the form of declaring on a bail-bond, was merely put by way of illustration; the point was not judicially before him. In *Whiskard v. Wilder*, it was objected, that the declaration ought to have particularly set forth "that the debt was *sworn to* by the plaintiff; and that the sum *sworn to* be due, and for which the defendant was holden to bail, was *marked on the writ*." But Sir *James Mansfield* said (b): "This has

(a) Lord Chief Justice *Best* was at *Guildhall*.

(b) 1 Burr. 332.

not been thought necessary to be set forth, till this time, ever since the making of the act of 12 Geo. 1. Nor does it, upon reading the act, appear to be an essential requisite to the *validity* of the bail-bond, nor in the nature of a condition-precedent to it; but, on the contrary, the statute of 12 Geo. 1 appears to be only *directory* to the Sheriff: so that, though *the Sheriff may be himself answerable* for such an omission (a), yet the *bond* is not void;" and Mr. Justice *Denison* said: "This original action appears to have been an *ac etiam* for 50*l.*, and a good precept is set out. Therefore, the defendant was liable to be arrested. And it is set out that he *was* arrested. This act of 12 Geo. 1, does not make the proceedings *void*, in case the defendant be arrested without affidavit and marking the sum sworn to upon the back of the writ: it only prohibits the Sheriff and plaintiff from doing it. And they may, indeed, be liable to an action *upon the case* for it (though perhaps not to an action of *trespass*); but it does not make the bail-bond void." Mr. Justice *Foster* concurred with the rest of the Court, and said, that, "if the fact was, that there was no affidavit, the defendant might have been relieved in a much easier method; by applying to the Court, or to a Judge, to be discharged upon common bail." There, as here, the demurrer was disallowed.

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Mr. Justice BURROUGH.—The only question is, whether we are to be guided by the decision of four Judges in the

(a) See *Wilcoron v. Nightingale* (1 Moore & Payne, 279; S. C. 4 Bing. 501), where—on demurrer to a declaration against the Sheriff, for an escape on *mesne* process, assigning for cause, that it was not alleged that any affidavit of the

plaintiff's cause of action was made or filed—it was held, that such allegation was unnecessary, it being averred that the writ was *duly* marked or indorsed for bail, before it was delivered to the Sheriff.

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Court of *King's Bench*, or by the mere *dictum* of one Judge in this Court.

Mr. Justice GASELEE.—In the case of *Hill v. Heale*, the commission was held not to be void, the statute 5 Geo. 2, c. 30, s. 23, being only *directory*. That was, in fact, the same point as that which arises in this case, but on another statute.

Judgment for the plaintiff (a).

(a) See the case of *Sharpe v. Abbey* (2 Moore & Payne, 312; S. C. 5 Bing. 193), where the same point was determined in conformity with the decision in this case, which was referred to by Mr. Justice Burrough.

IN THE EXCHEQUER CHAMBER.

TAYLOR, *qui tam*, v. WILLANS.
 [In Error.]

Wednesday,
 April 19th.

In a declaration in debt, *qui tam*, on the statute of gaming, the offence was alleged to have been committed "at the parish of St.

THIS was an action of debt, brought by the defendant in error (the plaintiff below) on the statute 9 Anne, c. 14, s. 2 (a), to recover from the plaintiff in error (the defendant below) penalties for gaming.

James, in the county of *Middlesex*:—*Held* (on error) sufficient, although there are in *Middlesex* two parishes of St. James, viz. St. James, Westminster, and St. James, Clerkenwell—the latter never being described without the addition of "Clerkenwell."

In debt on the statute of *Anne*, for money lost at play, the declaration averred that the party did, "at one and the same sitting, by playing at a certain game called '*Rouge et Noir*,' lose to the defendant a large sum, &c., and did then and there pay the same to the defendant"—without alleging that he played with the defendant:—*Held* sufficient.

(a) By which it is enacted—
 "that, from and after the 1st May, 1711, any person or persons whatsoever, who shall, at any time or sitting, by playing at cards, dice, tables, or other game

or games whatsoever, or by betting on the sides or hands of such as do play at any of the games aforesaid, lose to any one or more person or persons so playing or betting, in the whole,

The declaration, which contained thirty-eight counts, stated—that the defendant was attached to answer to the plaintiff, who sued “as well for himself as for the poor of the parish of *St. James*, in the county of *Middlesex*,” in a plea that he render to the poor of the parish aforesaid, and to the plaintiff, who sued as aforesaid, the sum of £——, which he owed to and unjustly detained from them; and thereupon the plaintiff, who sued as aforesaid, by *John Tatham*, his attorney, complained, that one *William Willans*, after the 1st day of *May*, in the year of our Lord 1711, to wit, on &c., in the year &c., “at the parish of *St. James*, in the county of *Middlesex*,” did, at one and the same time and sitting, by *playing* at a certain game

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the sum or value of 10*l.*, and shall pay or deliver the same, or any part thereof, the person or persons so losing, and paying or delivering the same, shall be at liberty, within three months then next, to sue for and recover the money or goods so lost, and paid or delivered, or any part thereof, from the respective winner and winners thereof, with costs of suit, by action of debt founded on this act, to be prosecuted in any of her Majesty's Courts of record; in which actions or suits, no *essoin*, protection, wager of law, privilege of Parliament, or more than one imparlance, shall be allowed; in which actions it shall be sufficient for the plaintiff to allege, that the defendant or defendants are indebted to the plaintiff, or received to the plaintiff's use, the monies so lost and paid, or converted the goods won of the plaintiff to the defendant's use, whereby the

plaintiff's action accrued to him, according to the form of this statute, without setting forth the special matter; and, in case the person or persons who shall lose such money, or other thing, as aforesaid, shall not, within the time aforesaid, really and *bonâ fide*, and without covin or collusion, sue, and with effect prosecute for the money, or other thing, so by him or them lost, and paid or delivered, as aforesaid, it shall and may be lawful to and for any person or persons, by any such action or suit, as aforesaid, to sue for and recover the same, and treble the value thereof, with costs of suit, against such winner or winners, as aforesaid; the one moiety thereof to the use of the person or persons that will sue for the same, and the other moiety to the use of the poor of the parish where the offence shall be committed.”

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called "*Rouge et Noir* (a)," lose to the defendant a large sum of money, to wit, the sum of 50*l.*, and did then and there pay the same to the defendant. The plaintiff then averred that *William Willans* did not prosecute with effect within the three months: whereby an action accrued to the plaintiff, &c.

At the trial, a verdict was taken for the plaintiff below, on the third, fifth, ninth, thirteenth, twenty-first, twenty-third, twenty-ninth, and thirty-seventh counts; and for the defendant below on the others. Judgment having been entered up for the plaintiff below, in the Court of *King's Bench*, the defendant below brought error into the *Exchequer Chamber*, assigning for causes:—

"That there are two parishes of *St. James* in the county of *Middlesex*—*St. James, Clerkenwell*, and *St. James, Westminster*, and that it did not appear on the face of the record which parish was meant; and also, that it was not sufficiently averred that *William Willans* lost the money to the defendant below at one and the same time, by playing *with* him, or that the defendant below played at all, or betted on those who did play, so as to bring the case within the statute 9 *Anne*, c. 14, s. 2."

Mr. *Brodrick*, for the plaintiff in error.—There are two objections on the face of this record: *First*, that the parish in which the offence is alleged to have been committed is not described with sufficient certainty—*Secondly*, that it does not appear that *William Willans* was playing *with* the defendant below.

(a) In *The King v. Rogier* (1 Barn. & Cress. 272), it was held, that the keeping of a common gaming house, and, for lucre and gain, unlawfully causing and procuring divers idle and evil-disposed persons to frequent and come to play

together at a game called "*Rouge et Noir*," and permitting the said idle and evil-disposed persons to remain playing at the said game for divers large and excessive sums of money, is an indictable offence at common law.

First—There are two parishes of *St. James* in the county of *Middlesex*, viz. *St. James* within the Liberty of *Westminster*, and *St. James, Clerkenwell*. The plaintiff below sued “as well for himself as for the poor of the parish of *St. James*, in the county of *Middlesex*,” without describing the particular parish or its precise locality. It is essential that the parish should be rightly described in the declaration and in the judgment, as a moiety of the penalty to be recovered goes to the poor of the parish wherein the offence was committed. The Court will take judicial notice that there are two parishes of the same name in *Middlesex*. According to various statutes, they are to be designated in a particular manner; neither is simply the parish of *St. James*; the addition must be given: particularly in the case of a penalty to be recovered for the use of the poor. In the statute 23 Geo. 2, c. 27, an act for the more easy and speedy recovery of small debts, *St. James, Westminster*, is described as “the parish of *St. James* within the Liberty of *Westminster*.” The statute 1 Jac. 1, c. 22 (private act) describes that parish in the same manner. On the other hand, the other parish of *St. James* is described in the 28 Geo. 3, c. 10, and the 30 Geo. 3, c. 69, as “*St. James at Clerkenwell*,” and, in the 15 Geo. 3, c. 23, as “*St. James Clerkenwell*.” If this objection had been taken at the trial, it might have been answered, that the parish in question was as well known by the one name as by the other. In *Kirtland v. Pounsett* (a), the plaintiff declared for the use and occupation of a house in the parish of *Lambeth*. It was proved that the name of the parish was *St. Mary, Lambeth*; though, in several local acts, it was described as “the parish of *Lambeth*” generally, and it was known by both names. This was held to be no variance; and Sir *James Mansfield* said: “The name of *Lambeth* is much better known than that of *St. Mary, Lambeth*;

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(a) 1 Taunt. 570.

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and the question is, whether it be not sufficient to call it by that name by which all mankind call it." But, when a parish derives its name from a Tutelar Saint, it must be described correctly, and if there be any omission, the variance has always been held fatal. In *Wilson v. Gilbert* (a), which was an action for non-residence, the parish was styled in the declaration as the parish of St. *Ethelburg*, the real name being St. *Ethelburga*—this was held a fatal variance. So, in *Harris v. Cook* (b), where, in an action on the case for an excessive distress, the premises were averred to be in the parish of St. *George* the Martyr, *Bloomsbury*, and the proof was, that the premises were in the parish of St. *George, Bloomsbury*—it was held to be an improper description. Although, in *Doe d. Tollet v. Salter* (c), in ejectment, the premises were laid to be in *Farnham*, and proved to be in *Farnham Royal*, and it was held no variance; and in *The King v. Glossop* (d), where the evidence in a conviction stated that the *Coburg* Theatre was in the parish of *Lambeth*, and the adjudication of the penalty was, to the poor of the parish of St. *Mary, Lambeth*—it was held that this was no variance: yet in neither of these cases did it appear that there were two distinct parishes bearing the same name. Although the description of the parish in the declaration might, at the trial, have been deemed sufficient; still, the judgment, which decrees one half of the penalties recovered, "to the poor of the parish of St. *James*, in the county of *Middlesex*," is bad and uncertain.

Secondly—It does not appear on the face of the declaration, whether the defendant below was playing or betting. Where the penalty is to be recovered by a common informer, the act giving it must be considered as strictly penal; remedial only, when the loser sues. The declaration alleges

(a) 2 Bos. & Pul. 281.

(c) 13 East, 9.

(b) 2 B. Moore, 587; S. C. 8

(d) 4 Barn. & Ald. 616.

Taunt. 539.

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"that one *William Willans*, at the parish of *St. James*, in the county of *Middlesex*, did, at one and the same time and sitting, by playing at a certain game called '*Rouge et Noir*,' lose to the defendant (below) a large sum of money, to wit, 50*l.*, and did then and there pay the same to the defendant (below)." It is not averred that he was *playing with* him. The statute only extends to money lost by one player to another, or by the by-standers betting on those who play; but it does not extend to the case of a person simply betting with a by-stander. In *Comyns's Digest*, it is said, that (a), "if an action be founded upon a statute, the plaintiff must aver every matter, which is requisite to entitle him to an action." Again (b), "So, the plaintiff, in his declaration, ought to aver every fact; without being informed of which, the Court cannot judge whether the plaintiff has cause of action. As, in an action founded on a statute, the plaintiff ought to aver every fact necessary to inform the Court that his case is within the statute: as, in *Quare Impedit*, by the King, on the statute 13 *Elix.* c. 12, for not reading the thirty-nine articles, it ought to be averred that it was a benefice with cure; (1 *And.* 62—*Lutw.* 1089); So, in *Quare Impedit* by the King, founded on the statute 31 *Elix.* c. 6, for simony (*Semb.* *Lutw.* 1089); So, in *Quare Impedit* by the University, on the statute 3 *Jac.* 1, c. 5, for the benefice of a recusant, the plaintiff must aver, that the patron was a recusant convict (10 *Co.* 58 a)." So, here, the plaintiff below should have averred, and proved at the trial, that the defendant below was *playing*. In *Lynall v. Longbothom* (c), which was an action of debt on this statute, the declaration alleged the money to have been lost to the defendant, by betting on the side of one *John Clarke*, at a certain game called a foot-race—it was held, that a foot-race is a game within

(a) Tit. "Action upon Statute," (A. 3).

(b) Tit. "Pleader," (C. 76).

(c) 2 Wils. 36.

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the act; but that it must appear that a man was playing at such game, or else a wager above 10*l.* laid upon his side, was not a betting within the statute; and Lord Chief Justice *Willes* there said (a): "The single question is, whether it appears that *Clarke* was playing at a game called a foot-race; for, if he was, this was a betting within the statute; but it is neither laid in the declaration, nor stated in the case, that he was playing at a game called a foot-race; and we can intend nothing that does not appear: there must be a betting on the side of a person *playing*; and, if no case had been stated, the judgment must have been arrested upon this declaration, because it is not laid that *Clarke* was *playing*. I think this is a penal law, and not merely remedial." The cases of *Spierres v. Parker* (b), *Rushton v. Aspinall* (c), and *Butt v. Howard* (d), are express authorities to shew, that, after verdict, nothing can be presumed but what is expressly stated in the declaration, or can be necessarily implied from those facts which are stated. It was not necessary, in this case, to prove that the defendant below was playing, as it was not averred; therefore, it cannot now be assumed that that fact was proved: for, nothing can be intended to extend the construction of a penal act beyond its express words.

[Mr. Baron *Hullock*.—In the case of *Frederick v. Look-up* (e), the declaration was precisely in the same form as that in the present case; save that there the action was brought for money lost by *betting* at cards, whilst here it is for money lost by *playing*.]

This objection was not taken there, and therefore the point now relied on was not considered by the Court.

[Lord Chief Justice *Best* observed, that there was no weight in the first objection, and that, therefore, the ar-

(a) 2 Wils. 40.

(b) 1 Term Rep. 141.

(c) 2 Doug. 679.

(d) 4 Barn. & Ald. 655.

(e) 4 Burr. 2018.

gument on the part of the defendant in error, might be confined to the last; and Mr. Baron *Hullock* said, that the two parishes in *Clerkenwell*, were always described as "St. John, *Clerkenwell*," and "St. James, *Clerkenwell*;" but never as "St. John," or "St. James" only (a)].

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Mr. *Patteson*, for the defendant in error.—Sufficient appears on the face of this declaration, to shew that the defendant (below) was playing with *William Willans*; for, it is distinctly averred, that the latter "did lose to the defendant (below) a large sum of money, to wit, 50*l.*, and did then and there pay the same to the defendant (below)." He could not have lost it to him unless he had been playing with him. It must have been proved at the trial, that they played together. All the precedents of declarations upon the statute of *Anne* are in the same form as the declaration in this case (b).

Lord Chief Justice BEST.—Two objections have been raised to this record. The *first* is, that, inasmuch as the plaintiff below sues as well for the poor of the parish of St. James, in the county of *Middlesex*, as for himself, and there are in the county of *Middlesex* two parishes that are known by the name of "the parish of St. James," the judgment is uncertain and erroneous; for that it does not shew to the poor of which parish the moiety of the penal-

(a) See the case of *Taylor v. Hooman*, (1 B. Moore, 161), where, in a declaration in trespass for breaking and entering a house, the premises were averred to be in the parish of *Clerkenwell*, and it was proved that *Clerkenwell* consisted of two distinct parishes or districts (St. John, and St. James, *Clerkenwell*), though the whole was generally known by

the name of St. James, *Clerkenwell*—this description was held insufficient.

(b) See *Wentworth's Pleading*, Vol. 7, pp. 148, 189, 220, 351—*Lill. Ent.* 158—*Morg. Pleader*, 614. 2 Wils. 36. In 7 *Went.* 336, there is a precedent where the plaintiff is alleged to have played with the defendant.

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 TAYLOR, q. t.
 v.
 WILLANS.

ty is to be paid. It does not, however, appear, by any act of Parliament, that there are in *Middlesex* two parishes known by the name of *St. James*. There is a parish in *Westminster*, which is sometimes called "*St. James's*," and sometimes "*St. James, within the liberty of Westminster*;" and there is also a parish called "*St. James, Clerkewell*;" but this latter is never described without the addition of "*Clerkewell*." We may, therefore, dispose of that point (a).

The *second* objection is, that the offence is not so described as to bring it within the statute. It has been said, that this is a penal act, and must, therefore, receive a strict construction. We are of opinion, that, giving it the strictest possible construction, this case is within it. It is averred, that the money was lost *to* the defendant by *playing*. If it had been lost to another, it would not have been lost by playing, but by betting; and, if lost by playing, it was clearly lost to the person *with* whom the party was playing. In the case of *Frederick v. Lookup*, the declaration was in the same form as this, and, although other objections were there discussed, the present was not raised. We are of opinion, that it is substantially shewn upon the face of the record that the parties were playing one with the other.

Judgment affirmed.

(a) In *Williams v. Burgess* (3 Taunt. 127), it was held, that, in a penal action, if a parish is styled by its popular and well-known

name, it is well enough, though that is not the name of consecration.

END OF EASTER TERM.

CASES
ARGUED AND DETERMINED
IN THE
Courts of Common Pleas
AND
Exchequer Chamber,
IN TRINITY TERM,
IN THE SEVENTH YEAR OF THE REIGN OF GEORGE IV.

—♦—
GARNER v. WELLER.

MR. Serjeant *Peake*, on the part of the defendant, applied for a rule, calling on the plaintiff to shew cause why the declaration in this cause should not be set aside, for irregularity. The irregularity complained of was, that, in the writ, the defendant was described as *John Weller*, and, in the declaration, as *James*; the latter being his real name.

Per Curiam.—In the case of *Spalding v. Mure* (a), the Court of *King's Bench* refused to set aside the proceedings for irregularity, on account of a variance between the original writ and the declaration. Formerly, the variance might have been the subject of a plea in abatement to the writ, but now it is otherwise; for, in the case of *Peake v. Davis* (b), this Court held, that a defendant cannot plead in abatement *to the original writ*, as he cannot have

1826.

Friday,
May 26th.

The Court refused to set aside a declaration, on the ground of a variance between the writ and declaration—the defendant being called *John* in the former, and *James* in the latter.

(a) 6 Term Rep. 363.

(b) 5 Tatunt. 653, n.

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oyer (a). The like practice prevails in the Court of *King's Bench*, according to the case of *Spalding v. Mure*; and it is a very beneficial practice, for, it tends, in a great measure, to get rid of pleas in abatement, the only use of which is, to retard and obstruct the proper course of justice.

The learned Serjeant, therefore, took nothing by his motion (b).

(a) In *Murray v. Hubbard* (1 Bos. & Pul. 645), the defendant, being arrested by the name of *F. H.*, put in bail by the name of *S. H.* The plaintiff declared against him as "*S. H.* arrested by the name of *F. H.*" The defendant pleaded the *misnomer* in abatement of the writ. The plaintiff treated the plea as a nullity, and signed judgment. This Court refused to set aside that judgment.

See also *Symmers v. Wason*, 1 Bos. & Pul. 105.

But see the case of *Wade v. Stiff* (1 Moore & Payne, 26), where, in trespass against four defendants, one of them pleaded a *misnomer* in abatement of the writ; and the Court, on demurrer, held the plea to be ill, because it concluded with a prayer of judgment "*of the writ, and that the same might be quashed, &c.*"—the *misnomer* of one defendant being no ground to abate the writ as against *all*: but it was not hinted, either by the Court or by counsel, that such a plea could not be pleaded at all; though the reason given above in the text, why it should not be allowed, seems very satisfactory.

(b) See the case of *Turing v. Jones* (5 Term Rep. 402), where

the Court of *King's Bench*, on motion, refused to permit the defendant to take advantage of a variance between the sum mentioned in the *ac etiam* part of the *latitat*, and the declaration.

Where a party held to bail obtains time to put in bail to the action, he cannot afterwards object to the writ for irregularity. *Moore v. Stockwell*, 6 Barn. & Cress. 76.

If the christian name of the defendant is omitted in the *latitat*, the Court of *King's Bench* will, if the process be *bailable*, set aside the proceedings, on motion; but, if it be *serviceable* only, they will not interfere on motion, but leave the defendant to plead in abatement. *Rolph v. Peckham*, 6 Barn. & Cress. 164.

The reason of this distinction between *bailable* and *serviceable* process is, that, in the former, the interests of third parties, *viz.* the bail, are involved. On the same principle, the Courts will not allow amendments in *bailable*, which would be permitted in *serviceable* process. See the cases of *Phillips v. Tanner*, 6 Bing. 237; *S. C.* 3 Moore & Payne; and *Houlder v. Fason*, 3 Moore & Payne.

1826.

Tuesday,
May 30th.

SELICK v. SMITH, KEELING, and DRAKE.

THIS was an action of trover, brought to recover the value of eighty hogsheads of sugar.

At the trial, before Lord Chief Justice *Best*, at *Westminster*, at the Sittings after the last Term, the following facts appeared in evidence:—

The plaintiff, a merchant at *Savannah*, in *Georgia*, one of the provinces of the *United States*, consigned the sugars in question to one *Richard Pettitt*, a merchant in *London*, with directions to him to sell them as soon as practicable, and to place the net proceeds to the credit of one *John Griswold*, of *New York*, to whom the plaintiff was indebted. *Griswold* accordingly drew bills on *Pettitt* to the supposed value of the shipment. The invoice stated that the plaintiff was the shipper of the sugars, and was accompanied by a letter from the plaintiff to *Pettitt*, directing him to sell them on his account. Previously to the arrival of the sugars, *Pettitt*, representing himself to be the owner of them, obtained from the defendants *Keeling & Drake*, who were his brokers, advances (in money and bills) to the amount of 1,200*l.*, in anticipation of the proceeds, and indorsed the bills of lading to them thus:—

“ Deliver the within contents to the order of Messrs. *Keeling & Drake*.

“ *Richard Pettitt*.”

Pettitt shortly afterwards absconded, and a commission of bankrupt was issued against him; but, previously to this, he had placed in the hands of one *Roswell Allen King*, the letters of the plaintiff and of *Griswold*, requesting him, *King*, to take charge of the consignments, and to provide for certain bills mentioned in the letters to have been drawn on him, *Pettitt*, by *Griswold*, on account of the sugars. In pursuance of these instructions from *Pettitt*,

In trover against the treasurer of the *West India Dock Company*, for sugars deposited in the company's warehouses:—
Held, that the treasurer was within the protection of the 185th section of the 39 *Geo. 3*, c. 69, and entitled to a verdict, the action not having been commenced against him within the time limited by that clause—notwithstanding his having delivered up the sugars to adverse claimants, under a bond of indemnity.

1826.

SELICK

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King, on behalf of the plaintiff, put a stop on the sugars in the Docks, and made a demand on the Company for their delivery to him on the plaintiff's account. This, however, was refused; and, on the 4th *June*, 1823, the sugars were delivered to *Keeling & Drake*, upon their giving to *Smith*, the Treasurer of the Dock Company, a bond of indemnity.

The bond recited—"That the goods mentioned and particularized in a schedule thereto subjoined, imported from *Savannah* into the Port of *London*, in the ship *Waterloo*, consigned to *Richard Pettitt*, were then lying in the warehouses of the *West India Dock Company*; that *Keeling & Drake* had represented to the said Company that the said goods were duly assigned to them by *Pettitt*, on a valuable consideration, and that they held the bills of lading for the same; that *Pettitt* had become insolvent, and the goods had been also claimed by one *R. A. King*, for and on behalf of the shippers thereof, and that *King* was unable to produce to the Company any authority from the shipper of the goods; that *Keeling & Drake* claimed delivery thereof as holders of the bills of lading; and that the Company had only consented and agreed to their application and request, on being indemnified in respect thereof."

The condition was, "that, if *Keeling & Drake*, their heirs, executors, &c., should and did, from time to time, and at all times thereafter, well and effectually save, defend, keep harmless and indemnified the said *West India Dock Company*, and their successors, lands, tenements, &c., and also the then and all and every future treasurer and treasurers of the said Company for the time being, of, from, and against, all and all manner of petitions, suits, losses, costs, charges, damages, claims, and demands whatsoever, which should be commenced, instituted, prosecuted, or carried on against, or which should be made upon, the said *West India Dock Company*, or their suc-

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cessors, &c., or upon the then present or any future treasurer or treasurers of the said Company, or which the said *West India Dock Company*, or their successors, or the treasurer or treasurers of the said Company for the time being, should or might pay, suffer, sustain, expend, &c., or be put unto, or become subject or liable to pay, for or by reason, or on account of the delivery of the said goods, mentioned and particularized in the schedule thereto subjoined, unto *Keeling & Drake*, by virtue of the said bills of lading, or by reason or on account of not delivering the said goods according to any former bills of lading, or to *King*, on behalf of the shippers thereof, or to the assignees under the commission of bankruptcy issued against *Pettitt*, or for or in respect of any other matter, cause, or thing whatsoever, in any wise relating to or concerning the said goods, or any part thereof;—then, the bond was to be void, otherwise, to be and remain in full force and effect.”

On the 5th *June*, *Keeling & Drake* sold the sugars, and placed the proceeds to the credit of *Pettitt*. A demand was then made of the proceeds of the sale on *Keeling & Drake*, by *King*, on the part of the plaintiff. This demand was not complied with, but no objection was made by *Keeling & Drake*, that *King* had no authority from the plaintiff to make it. After the sale of the sugars, and the demand of the proceeds by *King*, instructions were received by him from the plaintiff, confirmatory of those previously given to *Pettitt*, viz. that the sugars were to be sold on the plaintiff's account, and the proceeds placed to the credit of *Griswold*.

It also appeared, that the defendants, *Keeling & Drake*, had filed a bill in *Chancery* against the plaintiff, for a discovery; in his answer to which, he stated, that the sugars were his property; that they were shipped by him to *Pettitt* at the instance of *Griswold*, to whom he, the plaintiff, was indebted; that he had entered into an agreement with *Griswold*, that his debt should be paid out of

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the proceeds of the sugars; and that *Griswold* had insured the sugars on his, the plaintiff's, behalf, and had written a letter in which he said—"Mr. *Sellick* (the plaintiff) wishes the goods to be sold."

The fourteen days' notice required by the statute 39 *Geo. 3*, c. 69 (*a*), was given to the defendant *Smith*, as treasurer of the *West India Dock Company*, before the commencement of the action; but the suit was not commenced within *three* calendar months next ensuing the time of the refusal to deliver the goods to *King*, or the delivery of them, under the indemnity, to *Keeling & Drake*.

It was contended, on the part of the defendant *Smith*, that he was entitled to the protection of the 184th section of the statute (*b*), which directs that the *West India Dock Company* shall sue and be sued in the name of their treasurer; and the 185th section (*c*), after extend-

(*a*) Local Act.

(*b*) By which it is enacted—
"That all actions and suits commenced by or on behalf of the Company, shall be commenced and prosecuted in the name of the treasurer for the time being of the Company, as the nominal plaintiff for and on behalf of the Company; and that all actions and suits to be commenced by any person or persons against the Company, or for the recovery of any claim or demand upon, or of any damages occasioned by, the Company, or for any other cause or causes of action or suit against the Company, shall be commenced and prosecuted against the treasurer for the time being of the Company, who shall be the nominal defendant."

(*c*) By which it is enacted—
"That the statute 24 *Geo. 2*, c. 44, for rendering Justices of the

Peace more safe in the execution of their office, and for indemnifying constables and others acting in obedience to their warrants, so far as it relates to rendering Justices of the Peace more safe in the execution of their office, shall extend to the Lord Mayor, Aldermen, and Justices of the city of *London*, respectively, under the authority of this act; and that no action or suit shall be commenced against any person or persons for any thing done in *pursuance* or *under colour* of this act, until *fourteen* days' notice shall be thereof given in writing, or after sufficient satisfaction or tender thereof hath been made to the party or parties grieved, or after *three* calendar months next ensuing the time when the act or thing shall have been done, for which such action, &c., shall have been so brought, &c.: and the de-

ing the protection of the statute 24 Geo. 2, c. 44, for rendering Justices of the Peace more safe in the execution of their office, to the Lord Mayor and Aldermen of *London* acting under the 39 Geo. 3, c. 69, beyond the limits of the city, directs that "no action shall be commenced against any person, for any thing done *in pursuance* or *under colour* of that act, until *fourteen* days' notice shall be given in writing,—or after sufficient satisfaction or tender thereof,—or after *three* months after the act done"—and the case of *Wallace v. Smith* (a) was cited, where it was held, that the treasurer of the *West India* Dock Company was a person within the 185th section of the act, and entitled to the notice of action thereby required to be given.

For the plaintiff, it was insisted, that, as the action was not brought for a thing done *in pursuance* of the act, the defendant *Smith* was not entitled to the protection afforded by the 185th section of the statute; and that, even if the delivery of the sugars to *Keeling & Drake* had been a thing done in pursuance of the act, he had waived his right to shelter himself under the statute, by his having taken a bond of indemnity from them.

His Lordship was of opinion, that the delivery of the sugars to *Keeling & Drake* was clearly a thing done *under colour* of the act; and, therefore, that the defendant *Smith*

fendant in such actions &c., may plead the general issue, and give this act and the special matter in evidence at the trial, &c., and that the matter or thing for which such action, &c., shall be so brought, was done in pursuance, and by the authority of this act; and, if the said matter or thing shall appear to have been so done, or, if it shall appear that such action, &c., was brought before *fourteen* days' notice was given, as

aforesaid, or after sufficient satisfaction or tender thereof hath been made to the party or parties grieved, or after *three* calendar months next ensuing the time when the act or thing shall have been done, for which such action, &c., shall have been so brought, &c. &c., the Jury shall find for the defendant, he shall be entitled to treble costs."

(a) 5 East, 115.

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was entitled to the notice directed by the act to be given before action brought; and that the fact of his having taken a bond of indemnity from the other two defendants was not a waiver of his right to notice.

A verdict was accordingly taken for the defendant *Smith*.

On the part of the other defendants, *Keeling & Drake*, it was then objected—*First*, that, under the circumstances, the plaintiff had not a sufficient right of possession of the sugars at the time of the sale and conversion of them by the defendants, to enable him to maintain trover, as, had they remained under the control of *Pettitt*, the plaintiff could not have taken them out of his hands, until the bills drawn on *Pettitt* by *Griswold* had been paid.—*Secondly*, that *King*, at the time he made the demand on the Dock Company for the sugars, and on the defendants, *Keeling & Drake*, for the proceeds of the sale, had no authority from the plaintiff.—*Thirdly*, that, supposing *King* to have had sufficient authority for this purpose, the plaintiff had, by the demand of the proceeds, adopted the sale, and thereby waived his right to proceed for the *tort*; and that his remedy, if any, was by an action for money had and received.

His Lordship said, that, on the authority of *Gordon v. Harper* (a), if the plaintiff had only the right of property, but not the right of possession, he could not maintain trover for the sugars in question; that, although he might be considered only as a mortgagor, yet that as he was the shipper, and the bills of lading stated the sugars to be shipped on his account, and the directions to *Pettitt* were to dispose of them on the plaintiff's account, he was, notwithstanding the claim of *Griswold*, in the situation of a mortgagor in possession, having the special property and constructive ownership of the goods. As to the demand by *King*, his Lordship said, that, as the defendants did not at the time dispute *King's* authority, and it was afterwards

(a) 7 Term Rep. 9.

recognized by the plaintiff, there was nothing in the objection: and, as to the demand of the proceeds subsequently to the sale, his Lordship said, that it was no waiver of the plaintiff's right to maintain trover, as he might, at the time, have considered the sale to have been made *bond fide*, and that the proceeds were to have been paid over to him.

Leave, however, was reserved to the defendants to move the Court on all the points.

The Jury returned a verdict for the plaintiff as against *Keeling and Drake*.

Mr. Serjeant *Vaughan*, now, in pursuance of the leave reserved, applied for a rule calling on the defendant *Smith* to shew cause why the verdict found for him should not be set aside, and instead thereof a verdict entered for the plaintiff.—It is fit that the *West India Company*, as a public body, conducting a great public work, should be protected in the due performance and exercise of the powers delegated to them by the act; but the clause in question was only intended to protect them in the foundation of the Docks; it was not meant to extend to a case like the present, where goods are delivered by them, under an indemnity, to a person having no title to them; for then the thing done cannot be said to be done in pursuance of the act, and, consequently, is not within its protection. In many instances, the cause of action cannot be ascertained until long after the time limited by the act for commencing the action has expired. In *Wallace v. Smith*, the act of which the plaintiff complained, was an act done by the Company in pursuance and under colour of the statute; and it was held that they were entitled to notice of action, and that the treasurer was a person within the meaning of the act; and Lord *Ellenborough* said (a): “It has been argued that this construction will deprive persons of their remedy, whose ground of complaint is not discovered, so as to be

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(a) 5 East, 123.

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communicated to them till after three calendar months, when it will be too late to give notice. That argument certainly prevails to a considerable extent; but, if the Legislature have not provided for that, we cannot make a law for them, nor control a provision which in itself is clear and plain, because we cannot obviate all the difficulties which may arise out of it. If great inconvenience be likely to happen, that may form a ground of application elsewhere." Here, however, the Company have put themselves out of the protection of the act. The effect of the bond of indemnity taken by the treasurer was the same as if the goods had been retained by the Company. The sugars were, virtually, still in their hands.

Lord Chief Justice BEST.—I entertained no doubt on this point at *Nisi Prius*; but, to avoid the inconvenience of a discussion there, I reserved it for the consideration of the Court. I am clearly of opinion that the objection urged on the part of the defendant *Smith*, as to his being within the protection of the 185th section of the *West India Dock* act, is well warranted both by the letter and the spirit of the act. It has been truly said, that the Company are the conductors of a great public work. It has also been said, that the act only meant to extend protection to the members of the Company in the formation of the Docks, *viz.* in the purchasing of land, and excavating the ground. I am, however, of opinion, that this argument is not well founded, but that it was intended that the Company should be protected in such a case as the present. The Legislature meant that the notice of action, and the time limited for the commencement of actions against the Company for any thing done by them in the exercise of the powers conferred upon them by the act, should apply to all acts done by the Company as wharfingers and warehouse-keepers; and it is quite as necessary that they should be protected in carrying on the business of the Company, as in the formation of the works

for that purpose. If such notice of action were not to be given, and the time for commencing actions not limited to a short period, it would be impossible for the Company to ascertain the circumstances essential to their defence. The 185th section enacts, "that no action shall be commenced against any person or persons for any thing done *in pursuance* or *under colour* of the act, after three calendar months next ensuing the time when the act or thing shall have been done, for which such action shall have been so brought." The act or thing done in this case was clearly done in pursuance or *under colour* of the act. If not, the plaintiff had no right of action against *Smith*; for, he, as treasurer, could only be sued for a thing done in pursuance or under colour of the act, and he is sued as representing the Company. The case of *Wallace v. Smith* is not, in principle, distinguishable from the present. There, the action was brought against the treasurer for an act done by the Company, *vis.* the preventing the plaintiffs, brokers, from entering into their warehouses to clear certain baggage; and Lord *Ellenborough*, in delivering the judgment of the Court, said: "The plaintiffs themselves have, by their own action and declaration, so far put a construction upon the thing done as having been done under colour of the act, that they have made the *treasurer* defendant in a case, where the only grievance complained of is imputed to the *Company*." So, here, the act complained of was an act done by the Company; the defendant *Smith* is merely their representative. In the bond of indemnity taken from the two other defendants, the transaction is treated as a transaction with the Company. If that bond had not been given, the case of *Wallace v. Smith* would have been conclusive on this point; and I am of opinion that the bond does not in any degree alter the complexion of the case. The Legislature have afforded to the Company the protection of a notice, and a limitation of the

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time for suing them; and the circumstance of their officer taking a bond of indemnity by way of additional security, is no waiver of that protection. I am, therefore, of opinion that there is no foundation for this motion.

Mr. Justice PARK.—The defendant *Smith* either was or was not sued as the representative of the company. In either case the verdict is right; for, if he were not sued as representing the company, he was clearly entitled to a verdict, as he personally had been guilty of no conversion; if, on the other hand, he was their representative, and sued as such, he is within the protection of the act. It is clear, that the plaintiff himself thought so; for he gave the fourteen days' notice required by the same clause to be given before the commencement of any action for any thing done in pursuance of or under colour of the act. Lord *Ellenborough* asked, in *Wallace v. Smith* (a): "Is the treasurer a *person* within the meaning of the act? To say that he is not, would be to narrow the act without any sufficient reason. He is *ens legis* for the purpose of being sued, &c."

Mr. Justice BURROUGH.—The Dock Company are creatures of the act. The treasurer, as the representative of the Company, can have no existence but under the act. The thing complained of, *viz.* the delivery of the goods to *Keeling & Drake*, was clearly a thing done in pursuance and under colour of the act, and therefore within the protection intended to be afforded to the Company.

Mr. Justice GASELEE.—I concur with the rest of the Court, in thinking that there is no foundation for this motion. The powers and protection which the act was intended to confer upon the Company, were not to be confined to the mere formation of the Docks. The Company

(a) 5 East, 122.

have the care and conduct of all the shipping, and of all goods within the Docks and warehouses belonging to them; and I have known actions brought against them for ships not having had their proper turn, as well as where damage has been done to vessels in the Docks, in unloading them, and they have been held to be within the protection of the act. This action is brought for misconduct imputed to the Company, in delivering to the wrong persons, goods entrusted to the Company. The demand was made on the Company. The defendant recognized the act, as being done by them. The action, therefore, being brought against the treasurer, for an act done by the Company, it should have been commenced within the time limited by the 185th section of the statute.

Rule refused.

Mr. Serjeant *Wilde*, on a former day in this Term, obtained a rule *nisi*, that the verdict found for the plaintiff, against the other two defendants, *Keeling & Drake*, might be set aside, and a nonsuit entered, on the grounds urged at the trial, *viz.*—that the plaintiff had not, at the time of the alleged conversion, a sufficient right of possession of the sugars to entitle him to maintain trover—that *King*, at the time of making the demand, had no authority from the plaintiff—and that the plaintiff had waived his right to sue for the *tort*, he having assented to the sale of the sugars by demanding the proceeds,

Mr. Serjeant *Vaughan*, and Mr. Serjeant *Taddy*, now shewed cause.—The plaintiff had clearly both the right of property and the right of possession of the sugars in question. They were purchased and shipped by the plain-

ces made by them to him, and having become bankrupt the plaintiff authorised an agent to demand the sugars of the defendants; but they sold them, and the proceeds were demanded after the sale by the agent with the authority of the plaintiff:—*Held*, that the latter had a sufficient title in the sugars, to sue the defendants in trover, as the right of possession was in him, as *B.* had only an equitable interest; and that the defendants, by selling the sugars after the demand by the plaintiff's agent, were guilty of a conversion.

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The plaintiff, residing abroad, shipped sugars under a bill of lading addressed to *A.* in London, directing him to sell the sugars on the plaintiff's account, and place the net proceeds to the credit of *B.* to whom the plaintiff was indebted for advances made previously to the shipment. The invoice stated the plaintiff to be the shipper. *A.*, on the arrival of the sugars, pledged them to the defendants for advances

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tiff. The property in them was, therefore, vested in him, and there is nothing to shew that it was ever afterwards divested. They were shipped on the account and risk of the plaintiff, insured as goods of his, and he directed *Pettit* to sell them on his account. On their arrival, they were landed at the Docks in the plaintiff's name. *Griswold* had only an equitable claim on the proceeds; for, there can be no transfer of personal property, but by delivery of possession.

Although, at the time *King* demanded the sugars on account of the plaintiff, he had no authority from him to do so, yet, the subsequent authority given to him, and the ratification and recognition by the plaintiff of what *King* had done, were equivalent to an authority previously delegated to him (*a*); particularly, as no objection was raised by the defendants to the power assumed by *King*, at the time of his making the demand. In *Hull v. Pickersgill* (*b*), where the plaintiff, an uncertificated bankrupt, sued the defendants, who had become his creditors subsequently to his bankruptcy, in trespass, for breaking and entering his house, and the defendants, after a rule to plead, obtained from the assignees of the bankrupt a release of their interest in the effects seised—it was held that this was a ratification by the assignees of the previous seizure, and therefore that the plaintiff was not entitled to recover, on the ground that—

(*a*) See the case of *Maclean v. Dunn*, (1 Moore & Payne, 761), where this Court held a subsequent assent by a principal to a contract made by a broker without any previous authority, to be sufficient to take the contract out of the statute of frauds; and Lord Chief Justice *Best*, in delivering the judgment of the Court, said (1 Moore & Payne, 777)—“ I am clearly of opinion that the subsequent sanction or ratification of a contract signed by an agent, takes it out

of the operation of the statute far more satisfactorily than an antecedent authority. In the case of a previous authority, the party must trust to his agent for a faithful execution of his duty; but, if the authority be given subsequently to the making of the contract, the principal knows all that the agent has done, and ratifies and confirms his acts.”

(*b*) 3 B. Moore, 612; S. C. 1 Brod. & Bing. 282.

omnis ratihabitio retro trahitur, et mandato æquiparatur. So, in *Hagedorn v. Oliverson* (a), where the plaintiff effected an insurance on a ship, as well in his own name as for and in the name and names of all and every other person, &c., in the usual form, for the benefit of S., an alien enemy, and procured a licence to legalize the voyage, and a loss happened, and two years afterwards, S., by letter to the plaintiff, adopted the insurance—it was held, that the plaintiff might recover against the under-writer, averring the interest in S. In a case in the *Year Books* (b), upon an inquest between two parties on a writ of trespass for taking cattle, the defendant justified as bailiff for services due to the lord, and the plaintiff traversed that he was bailiff at the time of the taking, and shewed in evidence, that the defendant took them upon a claim of heriot due to *himself*, so that he could not be bailiff at the time to another; and Mr. Justice *Gascoigne* said, that, “if, when he took them, he claimed property for a heriot to *himself*, although the lord afterwards agreed to the taking for services due to him, yet could he not be his bailiff for that time. But if he had taken them *without command for services due to the lord*, and the lord had afterwards agreed to the taking, he should be adjudged his bailiff, though he had never been his bailiff before.” Here, although the plaintiff demanded the proceeds of the sale of the sugars, yet as his demand was not complied with, he had a right to maintain this action for the wrongful conversion by the defendants, after the demand made on them by *King* on behalf of the plaintiff.

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Mr. Serjeant *Wilde* in support of his rule.—As the plaintiff was indebted to *Griswold*, and *Pettitt* was directed to sell the sugars and place the net proceeds to *Griswold's* credit, the rightful possession was in him, and not in the plaintiff; and as he actually pledged the sugars to

(a) 2 Mau. & Sel. 485.

(b) 7 Hen. 4, 35.

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Griswold, for a debt previously due, *Pettitt* must be considered as *Griswold's* agent, and was bound to hold the sugars on his account, until the sale; if not, *Griswold* would have no security for his debt. A person may be agent for two distinct parties, having separate rights, and although the sugars might have been at the plaintiff's risk until they were landed, yet the moment they were, they in fact became the property of *Griswold*, and he had the legal right of possession until the debt due to him from the plaintiff was satisfied from the net proceeds of the sale. In *Stiernold v. Holden* (a), where goods were placed in the hands of a factor for sale, and he indorsed the bill of lading to the defendants, who thereupon accepted a bill of exchange for him, and he, at the same time, directed the defendants to sell the goods, and reimburse themselves the amount of the bill out of the proceeds:—it was held, that the defendants, having sold the goods, could not be sued for them in trover, by the original owner; but, it seems, that he might have maintained an action for money had and received, for the proceeds, and that the defendants could not have retained the amount of the money advanced to the factor. So here, as the plaintiff demanded the proceeds after the sale, he thereby adopted it, and could not afterwards treat it as a wrongful or tortious act. With respect to the authority of *King*, he must be considered as standing in the same situation as *Pettitt*, and he was merely to have the care of the sugars, and superintend the sale, but he had no authority from the plaintiff to take them out of the defendant's hands, or even to demand them on behalf of the plaintiff; and, although it has been said, that even if *King* were not authorized to make the demand at the time he did, still that the plaintiff afterwards ratified and confirmed his act; yet that circumstance cannot make the defendants wrong-doers by relation; at all events, the plaintiff should have demanded the sugars

(a) 1 Ry. & Mood. 219; S. C. 4 Barn. & Cress. 5. (b) 6 Dow. & Ryl. 17.

from the defendants before he commenced the action against them.

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Lord Chief Justice BEST.—Three objections were raised at the trial, and have been since brought before the Court as to the plaintiff's right to recover in this cause; and although I at first entertained a strong impression that neither of them was well founded, I reserved the points for the consideration of the Court. It has been insisted—*First*, that, at the time of the conversion of the sugars by the defendants, the plaintiff had no right of possession, or a sufficient property in them, to entitle him to maintain trover.—*Secondly*, that, at the time of the demand by *King* on the defendants to deliver up the sugars, he had no authority from the plaintiff to make such demand.—And, *Lastly*, that, as the plaintiff, through *King*, had claimed the proceeds of the sale effected by the defendants, he had thereby waived his right to sue them in trover, and that his remedy, if any, was by an action for money had and received to recover such proceeds. With respect to the first objection, on looking at the particular facts of the case, I think that the right of possession was in the plaintiff; and I do not speculate on what was intended by the parties, but what was actually done. This was purely a commercial transaction, and the bill of lading, under which the sugars were shipped, was addressed to *Pettitt*, with directions to him to sell the sugars on the plaintiff's account, and place the net proceeds to the credit of *Griswold*. Now, if it had been intended to convey the right of possession to *Griswold*, the bill of lading would have been indorsed to him in the first instance, and he might have indorsed it to *Pettitt*; but that was not done. The plaintiff was the shipper of the sugars, and, at the time of the shipment, was the legal owner, and had the right of possession; and nothing that transpired afterwards

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tended to divest him of such right, either by his answer to the bill filed against him by the defendants in the Court of *Chancery*, or by any document that was produced at the trial. By the bill of lading, the property was acknowledged to be in the plaintiff, and by his addressing it to *Pettitt*, and directing him to sell the sugars on the plaintiff's account, *Pettitt* must be considered as his agent, and acting for him alone. The invoice, too, shewed that the plaintiff was the shipper, and that the sugars were forwarded at his risk, and were to be disposed of on his account. The right of possession, therefore, continued in the plaintiff, subject to the equitable claim of *Griswold*, which was to be satisfied out of the proceeds of the sale. *Griswold* was content with a security short of a legal right, and relied on *Pettitt* for the due execution of the trust reposed in him, who was not to pay over the proceeds of the sale till *Griswold's* interest had been secured. Looking, therefore, at all the written documents produced at the trial, the plaintiff alone had the legal right of possession while the sugars existed in specie, and *Griswold* had a mere equitable claim on part of the proceeds only. The title of the plaintiff, therefore, was not so weak as that of a mortgagor who is allowed to remain in possession, for there was nothing like an absolute or legal mortgage to *Griswold*. The plaintiff, by his answer in *Chancery*, asserted that the property of the sugars was in him, and he merely admitted that he had entered into an agreement for securing *Griswold* the payment of his debt out of the proceeds. But even supposing that the plaintiff might be considered as a mortgagor in possession, he might maintain trover against all the world but the mortgagee. Here, however, the plaintiff had not only a special property but a special right of possession, and even admitting that *Griswold* might be considered as mortgagee in the strictest sense, yet, as he allowed the property to remain in the

possession of the plaintiff as mortgagor, the defendants, as wrong-doers, cannot set up *Griswold's* title, so as to deprive the plaintiff of his right to maintain trover against them for the unlawful conversion of the sugars. Although it may be said, that there is a material distinction between a mortgage of real and of personal property, I fully admit it; and though a mortgagor, in the case of realty, cannot bring ejectment, yet he may maintain trespass against any wrong-doer but the mortgagee; and where trespass can be maintained by a mortgagor in possession of real property, trover will lie for a mortgagor in possession of personal property. If a mortgagee should be abroad, or residing in a distant country, a mortgagor who lives here ought not to be deprived of his remedy to sue a wrong-doer; if it were otherwise, it would produce the greatest inconvenience both to landed and commercial interests. But, here, the plaintiff had a substantial right, and it is far better that he should succeed, than that technical objections raised for the defendants should avail, so as to keep the plaintiff out of his money, until *Griswold*, who was abroad, had prosecuted an action, and obtained a verdict against them.—*Secondly*, it has been insisted, that *King* had no authority from the plaintiff to demand the sugars from the defendants; but I am of opinion that no demand was necessary. When the defendants became possessed of the sugars, they held them as a security for monies advanced by them to *Pettitt*, who had no authority to pledge the sugars. If so, the possession by the defendants was wrongful, and a demand is only necessary where a party becomes lawfully possessed of goods in the first instance, but retains them as against the right owner. The case of *Stiernold v. Holden* is distinguishable from the present, as there the goods were delivered to the broker, not as a pledge, but to be sold, and they were sold in the ordinary course of trade, before any revocation by the principal of the direction to sell; and Mr. Justice *Bayley*

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said (a): "I am of opinion that the present action is not maintainable, and that the nonsuit was proper. It appears that *Stewart*, (the factor), when he indorsed the bills of lading to the defendants, directed them to sell the coffee, and at the same time gave them authority to hold the goods or the proceeds as a security for the sum of 1,500*l.* which they advanced to him. The authority to hold the goods by way of pledge was void, but the authority to sell was good and valid, that being within the scope of his duty as factor. It is admitted that the defendants did not make a premature and imprudent sale in order to cover their advance, but that the goods were sold in the usual course of business." Here, however, the sugars were not delivered by *Pettitt* to the defendants in the usual course for sale, but they were left with them as a pledge, and the defendants did not sell them by virtue of any legal authority from the plaintiff. He might have said that *Pettitt* was not authorized to pledge them, and so might *King*, as the agent of the plaintiff, and he demanded the sugars before the sale. If, therefore, a demand were necessary, *King* had sufficient authority to make it, although he acted under *Pettitt* alone; and as the defendants claimed to retain the sugars for the sum advanced by them to *Pettitt*, and refused to deliver them up when demanded by *King* on behalf of the plaintiff, they were guilty of a wrongful conversion. As to the question, whether the plaintiff, by claiming the proceeds of the sugars through *King* after the sale, has waived his right to maintain trover, I am of opinion that, as the demand was not complied with, or the proceeds paid over, he ought not to be prevented from obtaining his remedy by this action.

Mr. Justice PARK.—When the circumstances of this case are looked at, and the facts ascertained and under-

(a) 4 Barn. & Cress. 7.

stood, there can be no difficulty as to the law. The plaintiff was indebted to *Griswold* before the shipment of the sugars; and although he was so indebted, it appears by the bill of lading, that the sugars were shipped on account of the plaintiff, and consigned to *Pettitt*, as his agent. The bill of lading was accompanied with an invoice, which also stated the plaintiff to be the shipper of the sugars; and, he wrote a letter to *Pettitt* at the same time, instructing him to sell the sugars on his (the plaintiff's) account. When the sugars arrived, they got into *Pettitt's* hands, as the agent of the plaintiff, and they were to be sold on his account, and the net proceeds were to be placed to the credit of *Griswold*, as he had an equitable claim on the sugars for advances previously made to the plaintiff; and if *Griswold* intended to have taken the legal interest in the sugars, he should have done so at the time of the shipment; but, the substance of the transaction is, that *Pettitt*, to whom the sugars were consigned, was to sell them on the plaintiff's account, subject to *Griswold's* claim; but the resulting interest clearly remained in the plaintiff. It further appears, from the plaintiff's answer in *Chancery*, that *Griswold* did not consider the property as his own, for he effected an insurance on behalf of the plaintiff, and also wrote a letter, in which he stated, "that the plaintiff wished the sugars to be sold." If, therefore, the plaintiff shewed that the right of property in the sugars was once vested in him, which he clearly did by the bill of lading and the invoice, how was he divested of that right. As the defendants did not shew that they were authorized by the plaintiff to sell, he was entitled to recover; and I am strongly inclined to think, that no demand was necessary previously to the commencement of the action; but, even if it were, *King* had a sufficient authority to make it on behalf of the plaintiff. The rule for entering a nonsuit must, consequently, be discharged.

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Mr. Justice BURROUGH.—The facts of this case evidently shew, that the legal right in the sugars was in the plaintiff at the time of the shipment, and nothing was done to alter such right under the bill of lading. *Griswold* had merely an equitable claim on part of the proceeds of the sugars, as they were to be sold on the plaintiff's account. The right of possession was never out of the plaintiff, and the letter written by *Griswold* clearly shews that the sugars were to be sold for the plaintiff. As, therefore, *Griswold* had merely an equitable claim, and that only to a certain extent, the plaintiff is entitled to retain his verdict.

Mr. Justice GASELEE.—The merits of the case are clearly with the plaintiff, and I fully concur with the Court, except as to one point, *viz.*, whether the plaintiff has a sufficient interest to maintain trover; as to that, I entertain considerable doubt. I agree with my Lord Chief Justice, that a mortgagor in possession of a chattel, may maintain trover; but I think that the plaintiff must be considered as a mortgagor out of possession, and *Griswold*, as mortgagee in possession. The bill of lading operated as a conveyance of the sugars to *Pettitt* as the agent of *Griswold*; and if it were not so, why should the whole of the net proceeds be directed to be placed to his credit. Although the insurance was effected by *Griswold* on behalf of the plaintiff, yet the former had a direct interest in the produce of the sale, to cover advances previously made by him to the plaintiff. As the sugars were not delivered, or the proceeds paid over when demanded by *King*, I think the action may be maintained in its present form, particularly, as the Court are of opinion that he was authorized to make such demand. This rule, therefore, must be—

Discharged.

1826.

Tuesday,
May 30th.**DONATTY v. CROWTHER and KELLY, Sheriffs of London.**

THIS was an action of trover for the conversion of a mare, saddle, and bridle, and brought under the following circumstances:—

In the beginning of *February* last, a writ of *fieri facias*, returnable on the 12th of *April*, was sued out, and directed to the defendants, who were the Sheriffs of *London*, against the goods of one *Richard Cuttill*, for 59*l.*, at the suit of one *James Mills*; on the return-day, the officer learned that a mare belonging to *Cuttill* had been advertized for sale, and was then standing at livery at the plaintiff's stables. The officer accordingly went there, and on being informed that the mare was *Cuttill's* property, he seized and removed her, and she was ultimately sold, and the proceeds of the sale handed over to *Mills*.

A mare having been placed with a livery stable-keeper, who advanced money to the owner; it was agreed that she should remain as a security for the repayment of the sum advanced, and for the expenses of her keep:—*Held*, that the stable-keeper had a lien on the mare.

At the trial, before Mr. Justice *Gaselee*, at *Westminster*, at the Sittings after the last Term, it appeared that the mare had been placed under the care of the plaintiff, a livery stable-keeper, by *Cuttill*, who, being in want of money, had borrowed from the plaintiff 10*l.* at one time, and 20*l.* at another; and it was afterwards agreed between them that the mare should stand at the plaintiff's stables as a security for such advances; and that, if necessary, she should be sold by the plaintiff, under *Cuttill's* directions as to the price; and that the plaintiff was to repay himself all the expenses of her keep, and the sums advanced, out of the proceeds of such sale.

The Jury found a verdict for the plaintiff, damages 39*l.*, being the value of the mare, saddle, and bridle; but leave was reserved to the defendants to move to reduce them to one shilling, as nominal damages for the saddle and bridle, in case the Court should be of opinion that the plaintiff was not entitled to recover for the mare.

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Mr. Serjeant *Lawes* now applied for a rule *nisi* accordingly, and submitted, that this action could not be maintained—*First*, the plaintiff, being a livery stable-keeper, had no lien on the mare; for, in *Yorke v. Grenaugh*, Lord Chief Justice *Holt* took the distinction between an inn-keeper and a livery stable-keeper; and said (a), “that if a horse standing at livery be lost, the livery-man shall be answerable, yet he cannot retain for the meat, but has a remedy upon the contract; for he is not compellable to receive such a horse (b).” In *Hunter v. Barkley* (c), Lord *Kenyon* held, that a *livery stable-keeper* had no privilege to detain a horse for his keep; for that it is allowed to inn-keepers, on the ground of their being obliged to receive guests and their horses; but that that is not the case with livery stable-keepers, who rely on the contract. Or even if there had been a right of lien in this case, it was waived by the special agreement between the parties; *Brenan v. Currint* (d). If the bailee of property contract for a specified price for his labour or service, he loses all claim to a lien, which he may previously have had; the same rule will apply to a horse, if any specified terms as to its remaining in the custody of the stable-keeper were agreed on at the time it was left at livery. *Secondly*, even

(a) 2 Ld. Raym. 868.

(b) In *Bevan v. Waters* (Trinity Term, 1828), 3 Carr. & Payne, 520; S. C. 1 Mood. & Malk. 235, it was decided, by Lord Chief Justice *Best*, that, though in the general case of a livery stable-keeper, there is no lien; yet, that a man who has a horse for training, has a lien for the keep and exercise of it. See also *Wallace v. Woodgate* (Michaelmas Term, 1824), 1 Carr. & Payne, 575; S. C.

1 Ryan & Mood. 193, where Lord Chief Justice *Best* told the Jury “that a livery stable-keeper had not, by law, a lien for the keep of horses, *unless by special agreement with the owner of them*,” and see *Jacobs v. Latour* (Trinity Term, 1828), 2 Moore & Payne, 201; S. C. 5 Bing. 130.

(c) Esp. Ni. Pri. Dig. 2nd Edit. Vol. 2, 584.

(d) Sayer, 224.

admitting that the agreement that the mare was to stand at the stable as a security for money advanced, might create a claim to a lien, still trover is not the proper form of action, inasmuch as it was not brought against the owner, who was named in the writ, and who, if he had removed the mare against the plaintiff's right of lien, would have been liable to an action of trover; but against the Sheriffs, who acted under legal process, and whose only duty it was to ascertain that the property in the mare was in the party against whom the writ was sued out at the time it was executed; for, if the plaintiff had brought trespass against the defendants, they might have justified under the writ. If, therefore, the plaintiff had any remedy, it was by an action on the case against the defendants as Sheriffs, for improperly taking property out of his possession, over which he had a lien; the defendants had only to shew that the property in the mare was in *Cuttill*, against whom they were bound to execute the writ; they were, therefore, justified in making the seizure, notwithstanding any agreement between *Cuttill* and the plaintiff, who had no general right of lien, or, even if he had, he had waived it by the special agreement.

Lord Chief Justice BEST.—The plaintiff had a *bond fide* lien on the mare, which was pledged to him by *Cuttill* as a security for two several sums of money advanced to him by the plaintiff; and the mare was to be sold, and the plaintiff was to repay himself such advances, and also the expenses of her keep, in case they were not liquidated in any other manner. This is a case of personal property, not distinguishable in principle from that of a mortgage; and it has been decided, that a mortgagor of real property, though he cannot maintain ejectment, may maintain trespass against any wrong-doer except the mortgagee; and, where trespass will lie for the possessor of real property, trover may be maintained by the possessor of per-

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sonalty. In *Gordon v. Harper* (a) it was held, that trover may be maintained by any person having both the right of possession and the right of property; and in this case the plaintiff had evidently both these rights as against the true owner of the mare; and had he taken her away from his stables, without first satisfying his demands, the plaintiff would have had a clear right of action against him; but the defendants, as Sheriffs, took the mare as being the property of *Cuttill*, the owner; therefore, if he could not have removed her from the plaintiff's stable without satisfying his demands, neither could they—for they cannot put themselves in a better situation than the owner himself.

Mr. Justice PARK.—If there had been any fraud between the plaintiff and his debtor *Cuttill*, there would have been great weight in the argument adduced by my brother *Lawes*. It is admitted, that this is not a common case of lien. Although the mare was not merely pledged for the repayment of money, as in the case of goods pledged with a pawnbroker; yet the case is, under all its circumstances, *idem per idem*; and I consider the case of *Gordon v. Harper* to be in point, to shew that the plaintiff had a sufficient property in the mare to entitle him to maintain this action.

Mr. Justice BURROUGH.—Nothing but an absolute tender of the sums advanced, and the expenses of the mare's keep, could have restored the right of possession to the original owner; and, as long as she remained in the plaintiff's custody, he had a right of action against all the world, and even against the owner himself, if he had removed her without paying the sums advanced, as well as the charges for her keep.

Mr. Justice GASELEE concurred.

Rule refused.

(a) 7 Term Rep. 9.

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Tuesday,
May 30th.

M'ALLEN v. CHURCHILL.

THIS was an action of *assumpsit* for the breach of an agreement. The declaration stated, that, by an agreement between the plaintiff and defendant, the latter agreed to assign his interest in a lease of a public-house, to the former, for the term of thirty-one years, at the yearly rent of 100l.; that the plaintiff was to pay all taxes, and repair the premises, and take the fixtures and stock in trade at a valuation; and that the defendant was to pay all arrears of taxes up to the date of the agreement; that the plaintiff agreed to purchase the defendant's interest in the lease, and pay for the fixtures on these terms; and that he deposited 300l. in part of the purchase-money. The declaration then averred mutual promises. *Breach*—that the defendant had no right to assign the lease in question, nor had he any title to the premises agreed to be assigned, before or after the agreement was entered into. The defendant pleaded the general issue.

In *assumpsit* for the breach of an agreement, a clause contained therein, although illegal, as being in restraint of trade, if it form no part of the consideration, need not be set out in the declaration.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last Term, it appeared on the face of the agreement, that it contained a clause, (not set out in the declaration), whereby the defendant agreed, that he would not, directly or indirectly, take, occupy, or carry on the business of a publican or victualler within five years from the time of making the agreement. The Jury found a verdict for the plaintiff, on the ground that the defendant had no right or title to assign the premises.

Mr. Serjeant *Vaughan*, now applied for a rule *nisi*; that this verdict might be set aside and a new trial granted, or a nonsuit entered, on the ground that the whole of the consideration had not been set out in the declaration; and that the clause omitted, being an essential part of the con-

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sideration for which the house was to be assigned to the plaintiff, it vitiated the whole agreement, inasmuch as it was in general restraint of trade, and therefore illegal. In a note by Mr. Serjeant *Williams*, to *Hunlocke v. Blacklowe* (a), it is said, that "a bond, covenant, or promise, even on good consideration, not to use a trade any where in *England*, is void, as being too general a restraint of trade; and that, where the restraint is general, the contract is void, being of no benefit to either party, and only oppressive;" and here, the stipulation imposed on the defendant is in general terms, and therefore void. But the entire consideration must be stated in the declaration, and the clause in question is a substantial part of the consideration.

Lord Chief Justice BEST.—This objection as to the clause forming part of the consideration was not raised at the trial. It was merely contended that as the clause restrained the defendant from carrying on a business any where, it was illegal. The question of variance between the agreement and the declaration was not raised. But are we to say that every agreement is wholly bad, because it may happen to contain an illegal clause? In setting out a contract in a declaration of *assumpsit*, it is only necessary to state so much of it as contains the entire consideration for the act, and the entire act which is to be done in virtue of such consideration (b), and it appears to me, that the consideration in this case was sufficiently stated: the clause in question is a superadded or independent clause; it is a sort of rider, forming no essential part of the consideration. I therefore think that there is no ground to disturb the verdict.

The rest of the Court concurring—

Rule refused.

(a) 2 Wms. Saund. 156, n. 1.

(b) See *Clarke v. Gray*, 6 East, 564.

1826.

SIMMONS, and Three others, Vouchees.

Wednesday,
May 31st.

MR. Serjeant *Vaughan* moved that this recovery might pass, notwithstanding an objection had been made by the officer to the *dedimus* and warrant of attorney. There were four vouchees, three of whom appeared by *dedimus potestatem*, and the fourth, personally at the bar; and the officer thought his name should have been inserted in the *dedimus* and warrant of attorney, together with those of the other three; but, the learned Serjeant submitted, that this would have been irregular.

If one of several vouchees appear personally in Court, and the others by attorney, the name of the former need not be inserted in the *dedimus*, or warrant of attorney.

Mr. Justice BURROUGH.—One of several vouchees may appear personally at bar, though the others appear by *dedimus*; and he being in Court, no warrant of attorney can be required for him.

Fiat.

HAWKER, Deforciant.

Wednesday,
May 31st.

MR. Serjeant *Wilde* moved that this fine, which had been levied in 1808, might be amended, by altering the name of the parish of *St. Andrew, Plymouth*, to that of the parish of *Charles, Plymouth*. The motion was grounded on affidavits by the attorney who levied the fine, and the heir-at-law, who instructed him to do so; the application was made on the part of the purchaser. The affidavits stated, that, although the premises were described in the fine to be situate in the parish of *St. Andrew, Plymouth*, they formed part of a street, part of which was in that parish and part in the parish of *Charles*, the premises in question being in the latter parish; the

Where premises were described in a fine to be in the parish of *A.*, whereas, they were in fact in the parish of *B.*, being in a certain street, part of which was in *A.*, and part in *B.*; and the deed to lead the uses stated the premises to be in that street, in the parish of *A.* The Court, on an affidavit of the facts, allowed the fine to be amended, by

altering the name of the parish from *A.* to *B.*

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deed to lead the uses also stated the premises to be in the parish of St. *Andrew*.

Lord Chief Justice BEST.—There is nothing to amend by; the Court cannot amend both the fine and the deed; the heir-at-law may re-convey the premises to the purchaser.

But, upon the deed being read by the officer, it appeared that the premises in question were described as being in *Turville-street*, in the parish of St. *Andrew*, which street being sworn to be partly in the parish of St. *Andrew*, and partly in that of *Charles*, and that the premises in question were in the latter parish—

The Court allowed the amendment.

Wednesday,
May 31st.

WALKER, Clerk, v. RIDGWAY.

In an action by a clergyman against a farmer, for improperly setting out his tithes, the Jury found a verdict for the defendant, contrary to the opinion of the Judge. The Court directed a new trial; and anonymous letters having been inserted in the newspapers of the county where the cause was tried, reflecting on the character of the plaintiff, as a

clergyman:—the Court ordered the *venue* to be changed to a third county.

A RULE was obtained by Mr. Serjeant *Wilde*, in the last Term, calling on the defendant to shew cause why the *venue* on the second trial of this cause should not be changed to *London* or *Middlesex*, or some other county, on the ground that the plaintiff could not have a fair and impartial trial in *Herefordshire*, where the *venue* was originally laid, or in any of the counties adjacent thereto. The learned Serjeant founded his motion on an affidavit, which stated, that the action was brought by the plaintiff, a clergyman, against the defendant, a farmer, for setting out his tithes of wheat in an improper manner. That the cause was tried before Mr. Justice *Burrough*, at the last Summer Assizes, at *Hereford*; and that, al-

though the learned Judge expressed his opinion, that the tithes had been improperly set out, the Jury found a verdict for the defendant. That, in the last *Michaelmas* Term, the Court ordered a new trial (a); that, since the trial, several letters, and other anonymous articles had appeared in the *Hereford Journal*, and other county papers, reflecting on the plaintiff in his character of a clergyman, and which were likely to influence and prejudice the minds of the Jury against him on the second trial.

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Mr. Serjeant *Taddy* and Mr. Serjeant *Spankie*, now shewed cause.—They submitted that the present application was not only of a novel, but of an important nature, inasmuch as it was attempted to change the *venue* in a local action, after the cause had been once tried; and in *Butts v. Bilk* (b), the Court of *Exchequer* decided generally, that they could not, in any case of a new trial, direct the *venue* to be changed on an *ex parte* statement. Formerly, all suits were tried near the residences of the litigant parties; and, in a local action, the *venue* must still be laid in the county in which the cause of action arises; and, it is only when it is made to appear quite clearly to the Court, that a fair and impartial trial cannot be had in such action in the county where the *venue* is laid, that they will be induced to change it. This action was brought by a clergyman against a farmer, for improperly setting out tithes; after the trial, a full report of the evidence, and the charge of the learned Judge, appeared in the *Hereford Journal*, and other provincial papers, accompanied by fair comments thereon; and, although these papers had since contained several anonymous articles, censuring the conduct of the plaintiff, still, it by no means follows, that the parties to this action would be prejudiced

(a) See *ante*, p. 128.

(b) 1 Price, 146.

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by discussions in public journals, however improperly they might be conducted; or much less, that the improper conduct of others should be visited on the defendant, who, on affidavit, expressly denies having had any communication with the editors or writers on the subject; nor is there any affidavit on which the application is founded, to shew that any of these objectionable articles were inserted with the defendant's knowledge, privity, or consent. If the rule be made absolute in the terms as prayed, it will increase the dangerous power of these public prints to an alarming extent, inasmuch as it will enable the editors at any time to change the course and due administration of justice. There are two questions for consideration in this case:—*First*, whether there is any evidence that the obnoxious articles were inserted with the knowledge of the defendant;—and *Secondly*, if such knowledge be denied, whether the Court can interfere; or even if it were not denied, whether they would interpose, where they would necessarily so much increase the expenses of the defendant, by compelling him to bring his witnesses to a distant county. Although the Court have a discretionary jurisdiction to change the *venue*, yet, they will only exercise it where it is clearly shewn to them that a fair and impartial trial cannot be had in the county where the *venue* ought to be laid, for instance, in an action for words spoken of a Justice of the Peace, by a candidate upon the hustings at a county election. *Petyt v. Berkeley* (a). And, although in *The King v. Hunt* (b), the Court permitted a suggestion to be entered on the record, for the purpose of carrying the trial of a misdemeanor into an adjoining county; yet, on the face of the affidavits in support of the application, there was shewn a reasonable ground for believing that a fair and impartial trial could not be had in

(a) Cowp. 510.

(b) 3 Barn. & Ald. 444.

the county where the *venue* was laid. If there be any cause to doubt that the publication of these letters and paragraphs may have polluted the minds of the Jury, the plaintiff has it in his power to remove every difficulty, by summoning a special Jury.

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Lord Chief Justice BEST.—The policy of our antient constitution was, to bring justice home to every man's door; and in the time of *Alfred*, all actions were tried near the residences of the parties between whom the cause of action subsisted; but as the commerce of the country increased, some of its institutions were necessarily altered, and the old rule became relaxed; hence arose the distinction between local and transitory actions.

This, however, is one of the former class, and although the Court have a discretionary power to change the *venue* even in these, they ought not to exercise that power, except under very special circumstances. The present application is founded on a very extraordinary charge, not affecting the parties to the suit, but persons wholly unconnected with it—namely, the editors of certain provincial newspapers, who, by their improper conduct, are said to have exercised an undue influence over the minds of the inhabitants of the county, wherein the cause is to be tried. The liberty of the press will always be sanctioned by the Courts—for our constitution is bottomed on freedom, and the liberty of the press may be considered as the daughter of our constitutional liberty; but, it is also the duty of Courts to prevent the abuse of this liberty, and, although the editors of many of our journals represent themselves to be the friends and supporters of liberty, still, if they exercise it to the prejudice of individuals, instead of its tending to the promotion of useful knowledge, it becomes dangerous and prejudicial, and must be restrained. The publication of several of the letters in question tends to throw discredit and opprobrium on the charac-

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ter of the clergy in general, who ought not only to be secured against all attack, but upheld and supported by every possible means:—and these letters are calculated not only to have this bad effect, but also of necessity to prejudice the minds of the neighbourhood against the plaintiff, who belongs to that sacred body.

Although it has been urged, that the Court ought not to interfere after a trial has been had and a verdict found, yet it appears that this verdict was contrary to the opinion of the learned Judge who tried the cause; and whose summing up to the Jury has also been in these papers severely commented and reflected on. This appears to us to be a great contempt; for although the *dicta* of Judges are always open to fair comment, still it is the duty of Juries to attend to their exposition of the law, and they are not to exercise an arbitrary, uncontrolled, and unfettered discretion; otherwise, it would be impossible for any man to know by what standard to measure his rights; and those who recommend Jurors not to pay attention to the advice of Judges in matters of law, virtually recommend them to violate their oaths. *Ad quæstionem juris non respondent juratores.* A Judge must be presumed to be better acquainted with the law than a Jury, and if he happen to be wrong, either in his charge to a Jury, or in his judgment, he may afterwards be set right.

Although, if the verdict in this cause had been given against evidence, it might not have induced us to change the venue at the instance of the plaintiff; still, if he has since been held up as tyrannical and overbearing, so that the minds of a second Jury from the neighbourhood would be prejudiced against him,—it is our duty to guard against such evil consequences. We cannot say how far the poison of these publications may be disseminated, and we will therefore take care that this issue shall be removed out of the influence of their venom. It is certainly a hardship on both parties, as it will tend to increase their expenses;

and the defendant has denied all participation in these offensive publications; still we must see that substantial justice is done; and I think that it cannot be done, unless we accede to this application. I have no doubt that the editors of these papers are responsible for the extra expense to which their misconduct may have subjected these parties. We are, therefore, of opinion, from the facts before us, that, in order to afford the parties a fair trial, the venue must be changed to the county of *Warwick*.

The rest of the Court concurring, the rule was on these terms made—

Absolute.

GOODTITLE, on the demise of HARRIET GREEN, *v.* NOTITLE.

Saturday,
June 3rd.

THIS was an action of ejectment, brought by the lessor of the plaintiff, as mortgagee, to recover certain premises in the possession of the mortgagor.

On a former day in this Term, Mr. Serjeant *Wilde* obtained a rule calling on the lessor of the plaintiff to shew cause, why, on payment to her by the mortgagor of the arrears of interest due, and the costs of the action, and of this application, all further proceedings in the cause should not be stayed. The application was founded on affidavits, which stated that, in *March* 1824, the lessor of the plaintiff had advanced to the mortgagor the sum of 300*l.* for three years; the interest to be payable quarterly; that the interest had been duly paid up to the 17th of *September*

Where by a mortgage-deed, the principal sum was advanced by the mortgagee to the mortgagor, for three years from the date of the deed, the interest to be payable quarterly, and the deed contained a proviso, that, if default should be made in payment of interest on any of the days appointed for the same, the mortgagee might sell the premises assigned:—the mortgagor having

made default in the payment of one quarter's interest, the mortgagee brought ejectment, the Court refused to stay the proceedings on payment of the arrears of interest, and costs, by the mortgagor, as the case did not fall within the provisions of the statute 7 *Geo.* 2, c. 20, as the principal sum became payable on default of payment of the interest.

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last, and that shortly after the 17th of *December*, the mortgagor was called on to pay one quarter's interest, due on that day, and which not having been complied with, the present action was commenced. Under these circumstances, the learned Serjeant submitted, that, upon payment by the mortgagor of all arrears of interest and costs, the Court would exercise the equitable jurisdiction afforded them by the statute 7 *Geo. 2*, c. 20, s. 1, and stay the proceedings on the terms as prayed.

Mr. Serjeant *Vaughan*, was now about to shew cause; when the Court ordered the mortgage deed to be produced, which bore date the 17th *March*, 1824, and contained a proviso for redemption in the following terms:—

“ Provided always, and it is hereby agreed and declared by and between the mortgagor and mortgagee, that if the mortgagor, his heirs &c., do and shall on the 17th of *March*, which will be in the year of our Lord 1827, well and truly pay or cause to be paid unto the mortgagee, her executors, &c., the sum of 300*l.*, with such interest for the same, to the day of payment, as shall then be due thereon; and do and shall in the mean time, and until such payment of the said sum of 300*l.* well and truly pay, or cause to be paid unto the mortgagee, her executors, &c., interest for the said sum of 300*l.* after the rate of 5*l.* per cent. per annum from the day of the date of these presents, by equal quarterly payments on the 17th of *June*, the 17th of *September*, the 17th of *December*, and the 17th of *March*, in each and every year, and make the first quarterly payment thereof on the 17th of *June* now next ensuing; and do and shall make such respective payments, without any deduction or abatement whatsoever, then the mortgagee, her executors, &c., shall and will at the request and at the expense of the mortgagor, his executors, &c., release, assign, or otherwise dispose of the premises by the deed respectively assigned and demised to the mort-

gagor, his executors, &c., free from all incumbrances, &c.; *Provided also*, and it is hereby further agreed and declared, that in case default shall be made by the mortgagor, his executors, &c., in payment of the said sum of 300*l.*, or any part thereof, as aforesaid, *or if default shall be made* by him or them *in payment of the interest* on the said sum of 300*l.*, or any part thereof, *on any of the days* or times hereinbefore mentioned or appointed for payment of the same respectively;—in either of the said cases, *it shall* and *may be lawful for the mortgagee*, her executors, &c., *absolutely* to sell, assign, or dispose of the premises so assigned and demised by these presents, either altogether or in parcels, by public auction or private contract, &c.”

By a subsequent clause, the proceeds of the sale were to be vested in the mortgagee, her executors, &c., *upon trust*, to pay the expenses of such sale; and, in the next place, upon trust to retain and pay unto the mortgagee, her executors, &c., *the said sum of 300*l.* and all interest* for the same, or so much thereof respectively as should *then remain due and owing*, and to pay over the surplus, if any, to the mortgagor, his executors, &c.

The Court now called on Mr. Serjeant *Wilde* to support his rule.—Before the statute 7 *Geo. 3*, c. 20, was passed, it was customary for the Courts to stay the proceedings in ejectment by the mortgagee, after the day of payment, on payment to the lessor, or bringing into Court, principal, interest, and costs (a); and, by the 1st section of that statute, it is enacted, that “where any action of ejectment shall be brought by any mortgagee, &c., for the recovery of mortgaged land, if the person having a right to redeem such land, shall, at any time pending such action, pay unto such mortgagee, or, in case of his refusal, shall bring into Court, all the principal monies and interest due

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(a) *Anonymous*, 1 Str. 413.

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on such mortgage, and also all costs, to be ascertained by the Court, or proper officer appointed for that purpose; the monies so paid or brought into Court shall be deemed and taken to be in full satisfaction and discharge of such mortgage, and the Court shall and may discharge the mortgagor of and from the same accordingly."

Although this statute may not be strictly applicable to the present case, inasmuch as, by the terms of the deed, the mortgagee is empowered to sell the mortgaged premises on default of payment of a quarter's interest on the day on which it shall become due; yet, as a Court of equity would probably relieve the mortgagor on the terms now prayed, and this Court has, by the statute, an equitable jurisdiction in such cases, they will prevent the interference of a Court of equity, by allowing the proceedings to be stayed, on the usual terms; and thus justice will be effectually done between the litigant parties, without putting them to unnecessary expense and delay.

Lord Chief Justice BEST.—We should be most happy to relieve the mortgagor, if we felt ourselves empowered so to do; for we consider the present action to be exceedingly vexatious: but we are bound to regulate our proceedings by the rules of law. The only question therefore is, whether this case falls within the terms of the statute 7 Geo. 2; if it does not, we are not at liberty to stay the proceedings in the action on equitable considerations, to the detriment of a legal right. If we were possessed of such a power, we might save the parties the expense of a suit in equity, in many instances; but as our authority in this case is derived solely from that statute, we cannot interfere unless the parties stand expressly within its terms and operation. By the 1st section, if the person having the right to redeem shall, at any time pending the action, pay to the mortgagee, or bring into Court, *all the principal monies and interest due on the mortgage with*

costs, the Court may discharge the mortgagor. It is clear, we have no jurisdiction unless *all that is due* is paid to the mortgagee, or brought into Court; and if the mortgagor had done so in this case, he might have brought himself within the equity of the statute; but he has not done so; for, although by the terms of the proviso for redemption, the principal was not payable till *March, 1827*, yet there was another condition annexed, *viz.* that the interest should be paid to the mortgagee quarterly; and that, in case *default* should be made *in payment of the interest*, or any part thereof, on any of the days respectively appointed for payment of the same, *then* the mortgagee had an absolute right to re-enter, and, by the sale of the premises, to pay herself *the said sum of 300l. and so much of the interest as was then due*, paying over the surplus to the mortgagor. On default therefore of the payment of a quarter's interest by the mortgagor, the principal became in the nature of an immediate debt to the mortgagee; and without the payment of that debt, I do not see how even a Court of equity could relieve the mortgagor; and certainly, if equity could not, this Court cannot interfere. If a mortgagor stipulate to pay interest under such conditions, and fail to do so, we cannot relieve him from the consequences of his default, or substitute a new agreement for him. The case is similar to that of a warrant of attorney, payable by instalments; where, if default be made in the payment of one, the party to whom it is given may enter up judgment, and sue out execution for the whole. It is certainly a hard case on the mortgagor, and we would assist him if it were in our power, but he must be bound by his own deed.

Mr. Justice PARK.—The parties in this case came before me at Chambers, but the deed was not then produced. I was strongly disposed to relieve the mortgagor, but I thought I had no jurisdiction under the statute 7 Geo.

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2; and therefore refused to interfere to stay the proceedings, except on payment of the principal, interest, and costs. There are two provisos in the mortgage-deed: the first postpones the time of payment of the principal till *March, 1827*; but the second proviso, by giving the mortgagee a power to sell immediately on default of payment of one quarter's interest, virtually makes the principal payable *instantly* upon such default; and this latter proviso seems to me to tie up the hands of a Court of equity, as effectually as it does ours.

Mr. Justice BURROUGH.—The terms of the proviso in this deed at first created some difficulty in my mind; but I have now no doubt upon the subject: the question is, whether the principal is due or not;—if it be due, then we cannot relieve the mortgagor under the statute of 7 *Geo. 2*, without payment of it by him to the mortgagee. By the default of payment of a quarter's interest, on the day appointed by the deed, I think the principal is due; and therefore it is out of our power to relieve the mortgagor.

Mr. Justice GASELEE.—It is not necessary for us to consider what we might have done if the principal had not been due, as, from the terms of the mortgage deed, it clearly appears to be due. If this case does not come within the terms of the statute, we have no authority to stay proceedings on equitable principles: therefore, this application cannot be acceded to. If the mortgagor had enlarged the terms of his motion to the payment of principal, interest, and costs, it would have been a very different question.

Rule discharged.

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BAYLEY and Another v. BEAUMONT.

MR. Serjeant *Vaughan* applied for a rule nisi, that the Prothonotary might review his taxation in this cause, on the ground of his not having allowed the plaintiffs their charges attending the making of a model of a conservatory, (for the erection of which this action was brought), as well as a compensation for loss of time to scientific persons, who were sent by the plaintiffs to *York*, to examine the conservatory, as, without such examination, they could not have safely proceeded to trial. Although in *Severn v. Olive* (a), where the Prothonotary, on taxation, had allowed for various sums expended in experiments, and a compensation for loss of time to scientific men employed in making them, and who were called as witnesses at the trial, the Court directed him to review his taxation, on the ground that no such allowance or compensation ought to have been made; yet there, the Prothonotary had allowed a compensation to the witnesses for the loss of their time in making these experiments; whilst, in the present case, the application was confined to a compensation for the loss of the witnesses' time, during their journey from *London* to *York*, and the Prothonotary had only allowed the actual expenses of the journey. In *Lopes v. De Tastet* (b), a witness, who was the captain of a foreign vessel, was allowed a liberal compensation for the loss of a voyage by him, and for the time he was detained in this country, before the trial took place; and here the witnesses should have been allowed a compensation for the loss of their time during their journey to *York*, for the purpose of examining the structure and materials of the conservatory, as, without their testimony, the Jury could not have

A plaintiff will not be allowed his expenses, in the construction of a model, nor a compensation for loss of time to scientific persons, who had been sent to a distant part of the country to inspect a building there, although he could not safely have proceeded to trial without their testimony.

(a) 6 B. Moore, 235.

(b) 7 B. Moore, 120, cited in *Severn v. Olive*, 6 B. Moore, 239, 240.

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ascertained what damages the plaintiffs might have been entitled to recover.

Lord Chief Justice BEST.—It is impossible to distinguish this case from the principle laid down in *Severn v. Olive*, where it was expressly decided, that scientific men were not entitled to any compensation for loss of time; and Lord Chief Justice Dallas justly observed, that such allowance was confined to medical men and attornies only. So, in *Moor v. Adam* (a), the same point was decided; which case was confirmed, and even carried further in *Willis v. Peckham* (b), where it was held, that a witness attending a trial under a *subpœna* was not entitled to a compensation for loss of time, although the party requiring his attendance had expressly promised to pay him for such loss.

The rest of the Court concurring—

Rule refused.

(a) 5 Mau. & Selw. 156.

(b) 4 B. Moore, 300.

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The defendant having been arrested in *Middlesex*, original bail were put in there; and afterwards added bail were taken before a commissioner in the country, and put in with the filacer for *Middlesex*:—Held regular; the commissioner in the country having full authority to act by virtue of his commission.

MOORE v. KENRICK.

MR. Serjeant *Wilde* moved that the rule for allowance of bail in this cause might be set aside, on an affidavit, which stated that the defendant was arrested under a writ of *capias*, in *Middlesex*; that the venue was laid in that county, and that the original bail had been put in there; but that afterwards added bail had been taken before a commissioner in *Denbighshire*, and put in with the filacer for *Middlesex*. The learned Serjeant submitted that the added bail should have been taken in the county into

which the writ issued; and that a commissioner in *Wales* was not authorized to take the added bail, which should have been put in in *Middlesex*.

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Mr. Serjeant *Peake*, *contra*, relied on the statute 4 & 5 *William & Mary*, c. 4, s. 1, by which it is enacted, that “any two of the Justices of the *King’s Bench* or *Common Pleas*, whereof the Chief Justice of each Court shall be one, may, by commission under the seal of their respective Courts, from time to time empower certain persons in all the shires in *England*, *Wales*, and *Berwick-upon-Tweed*, to take such recognizances of bail as any person shall be willing to acknowledge or make before them, in any action depending in the said Courts, in such manner and form as the said Justices of the said Courts have used to take the same; which said recognizance of bail or bail-piece shall be transmitted to one of the Justices of the said Courts, who, upon affidavit of the due taking of the recognizance of such bail or bail-piece, by some credible person present at the taking thereof, shall receive the same upon payment of the usual fees; which recognizance of bail or bail-piece, so taken and transmitted, shall be of the like effect as if the same were taken *de bene esse* before any of the said Justices.” Bail may be taken before commissioners wherever it may be found most convenient to the party sued; and after the recognizance or bail-piece is transmitted to one of the Judges of the Court from which the process was originally sued out, the bail is regularly put in with the filacer of the county into which the *capias* issued.

Lord Chief Justice *Best*.—I feel no difficulty whatever on the subject; but I think we ought to look at the commission, to see what power we have given the commissioners.

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On the following day, Mr. Justice PARK, in the absence of the Lord Chief Justice, read the commission, which gave the commissioners authority "to take all and every such recognizance as any person should be willing to enter into before them in their county." The learned Judge then observed, that it appeared to the Court that there was no ground for the objection. The commissioner in *Wales*, before whom the added bail were put in, had full authority to act. This very point was raised in the Court of *King's Bench* in the last Term, and they decided that there was no foundation for the objection: and, were the contrary to be held, if a person, residing in *Northumberland* were to come to *London*, where he was not known, and be arrested there, he would be obliged to send for his bail down to *Northumberland*.

The rest of the Court concurring—

Rule discharged.

Tuesday,
June 6th.

TUCKER v. WRIGHT.

The Court will not stay proceedings in an action of trover, on the terms of the defendant's delivering up the goods converted, to the plaintiff, or paying their value, where such value is not ascertained.

THIS was an action of trover.

Mr. Serjeant *Taddy*, on the first day of this term, had obtained a rule, calling on the plaintiff to shew cause, why the proceedings in this cause should not be stayed, upon the defendant's delivering to the plaintiff two pieces of cloth, (to recover damages for the conversion of which the action was brought), or upon payment of the value thereof. The motion was founded on affidavits, which stated that the plaintiff's wife had delivered the cloth to the defendant, to be used in covering chairs; that all but eighteen yards had been applied to that purpose, and that

the chairs so covered, together with the remaining cloth, had been returned to the plaintiff; that the defendant had afterwards seized some goods of the plaintiff's, among which was the cloth in question, without a legal warrant, in satisfaction of a debt due from the plaintiff to the defendant and his partner; that the plaintiff commenced an action of trespass against the defendant, and recovered a verdict against him, with damages to the amount of 200*l.*; that the present action was brought to recover damages for the conversion of this cloth, and that the defendant was willing to return the value of it, he having sold the greater part of it under a mistake. The learned Serjeant cited the case of *Pickering v. Truste* (a), in which the Court stayed the proceedings in an action of trespass for seizing goods, on the terms of the defendant's restoring the goods, or paying the full value of them, with the costs of the action. And, in *Tuney v. Clarke* (b), which was an action of trover, Mr. Serjeant *Darnell* declared he had obtained a rule to bring into Court two fowls in one term, and in the next term, a spare-rib of pork, or money in lieu thereof.

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Mr. Serjeant *Wilde* now shewed cause.—The plaintiff seeks to recover damages against the defendant, for the conversion of his property; but, as the defendant has disposed of the greater part of that property, and the remainder may be much deteriorated in value, those damages cannot be ascertained without the intervention of a Jury. The defendant was employed, in the first instance, to cover the chairs by the plaintiff's wife, without his knowledge, as he was at that time living separate from her; and the defendant, after returning the chairs and cloth to the husband, seized the latter in satisfaction of a debt due from him; and being unable to pay the damages which a Jury had awarded against him, had gone

(a) 7 Term Rep. 53.

(c) Cooke's Cas. Prac. C. P. 59.

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to prison, from which he had been discharged under the Insolvent Act. But, as the defendant has disposed of part of the cloth, it is impossible to say what its value might have originally been.

The Court here called on Mr. Serjeant *Taddy* to support his rule.

The learned Serjeant relied on *Brunsdon v. Austin* (a), where, in trover brought by the assignees of a bankrupt, for a steam engine, &c., the Court of *King's Bench* made a special rule for staying the proceedings, on delivery to the plaintiffs of a part of the goods for which the action was brought, and payment of costs up to that time, provided the plaintiffs would accept thereof in discharge of the action; or, otherwise, that the articles delivered should be struck out of the declaration, and the plaintiffs be subject to costs, unless they should obtain a verdict for the remainder of the goods, or prove a deterioration of the part delivered up.

Lord Chief Justice BEST.—Such an application as the present does not appear ever to have been made before; and, if we were to allow it, we should, in effect, convert the officers of our Court into a Jury. It is true, that in cases where justice may be more effectually done, the Court will order proceedings to be stayed, on the defendant's delivering up a specific thing, for the recovery of which the action is brought; but we cannot interfere in a case like the present, where there is an uncertainty either as to the quantity or quality of the property demanded. The defendant does not offer to deliver up the cloth in the state in which he received it; it would, therefore, be necessary to refer it to the Prothonotary to ascertain the value of that part which had been sold; and how could

(a) Tidd's Practice, Vol. 1, 545, 9th Edit.

he possibly do it? In the cases referred to, the value of the goods was admitted, or does not appear to have been disputed. In *Brunsdon v. Austin*, the Court only ordered part of the goods to be delivered up, provided the plaintiffs would accept of them in discharge of the action, on payment of costs up to the time of delivery; but the Court will not interfere where the goods themselves cannot be restored, and the Prothonotary must invade the province of the Jury, in order to ascertain or fix their value:—besides, the cloth in question has been in the defendant's hands for a considerable time, and its value may have been much deteriorated.

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Mr. Justice PARK.—This case was before me at Chambers; the defendant applied for time to plead, on the ground that he was about to make the present application to the Court; and I then thought it could not avail him. The case of *Brunsdon v. Austin* has no bearing on the present; the rule, as laid down by Mr. *Tidd* (a), and which appears to me to be the true one, is, that where trover is brought for a *specific* chattel of an *ascertained quantity and quality*, and unattended with any circumstance that can enhance the damages above the real value, the Courts will make an order for staying the proceedings, upon delivering it to the plaintiff, and payment of costs. But the present case by no means comes up to these requisitions, as the defendant has disposed of part of the cloth, and the part remaining may have been deteriorated in value.

The rest of the Court concurring—

Rule discharged with costs (b).

(a) Page 545, 9th Edit.

(b) In *Knott v. Barker* (3 Anstr. 896), the Court of *Exchequer* refused to stay proceedings in an action of trespass for seizing

goods, on the defendant's restoring them, or the value, with costs, where it would not end the suit, and the value of the goods was not admitted.

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Tuesday,
June 6th.

HATTON and Another, Assignees of Moss, a Bankrupt, v.
BRISTOW.

It is sufficient if an affidavit of debt, made by one of the assignees of a bankrupt, state that the defendant is indebted, &c., as appears by the books of the bankrupt, and as the deponent verily believes; without alleging that the books are in the deponent's possession.

MR. Serjeant *Wilde*, applied for a rule *nisi*, that the defendant might be discharged out of custody on entering a common appearance, on the ground of the insufficiency of the affidavit to hold to bail, under which he had been arrested; and which stated that "the defendant was indebted to the deponent and the co-plaintiff, as assignees of *Moss*, a bankrupt, for goods sold and delivered by *Moss*, before he became bankrupt, to the defendant, and at his request, as appeared by the books of the bankrupt, and as the deponent verily believed." The learned Serjeant contended, that this was insufficient, and referred to *Tidd's Appendix (a)*, to shew that the affidavit should have stated the books to be in the deponent's possession; but—

Lord Chief Justice BEST cited the case of *Swayne v. Crammond (a)*, as being expressly in point.

Rule refused.

(a) Page 85, s. 93, 9th Edit.

(b) 4 Term Rep. 176.

Thursday,
June 8th.

PAGET v. THOMPSON.

An infant defendant having appeared by attorney, the Court ordered the appearance to be struck out of the filacer's book, and that, if the defendant should appear by guardian, his plea should be made conformable thereto; and that the defendant should pay the plaintiff's costs.

MR. Serjeant *Wilde*, on a former day in this Term, had obtained a rule, calling on the defendant to shew cause why his appearance by attorney, which had been entered on the filacer's book, should not be struck out; and why, if the defendant should appear by guardian, his plea should not be made conformable thereto; and why the defendant should not pay the plaintiff his costs occasioned

should be made conformable thereto; and that the defendant should pay the plaintiff's costs.

by the defendant's attorney having appeared and pleaded for him, knowing him to be an infant; and why the defendant should not be obliged to accept notice for trial, for the Sittings after this Term. The learned Serjeant founded his motion on affidavits that the defendant was an infant; that the present action was brought against him for criminal conversation with the plaintiff's wife, and that the defendant had appeared by attorney.

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Mr. Serjeant *Cross* now shewed cause; and relied on the case of *Bird v. Pegg (a)*, where judgment of nonsuit having been given in an action brought against an infant, it was held to be no ground of error, that the infant had appeared by attorney; and Lord Chief Justice *Abbott* said, "It would be greatly to the prejudice of the infant, to allow the plaintiff below to avail himself of the infant's appearing by attorney as a ground of error."

Lord Chief Justice *BEST*.—It is a settled rule that an infant defendant cannot appear and defend by attorney; if he does, and the plaintiff obtains judgment against him, he may assign his appearance by attorney, as a ground of error. It appears as if this were a trick on the part of the defendant's attorney, to enable the defendant to take advantage of the objection on error; we shall therefore make the rule absolute with costs, and leave the defendant to his remedy against his attorney, whose duty it was to have inquired into the age of his client: the officers of the Court must not be allowed to deceive a party suing, or lead him to believe that the defendant is an adult when he ought to know that he is not so.

The rest of the Court concurring—

Rule absolute.

(a) 5 Barn. & Ald. 418.

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Thursday,
June 8th,

A party taking a bank note in payment of a bet from a stranger on a race-course, is not bound to use the same precaution as would be requisite if the note were taken by a tradesman.

SNOW and Others v. SADLER.

THIS was an action of trover, for the conversion of a 30*l.* Bank of *England* note.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last Term, it appeared, that the plaintiffs were bankers in the *Strand*, and that the defendant was a horse-dealer, residing at *Oxford*: that, in *September*, 1824, the note in question, with two others, had been stolen from the plaintiffs' porter; that they duly advertised their loss; and ultimately traced the note in question to the possession of the defendant. According to the evidence of one witness, (a clerk to the plaintiffs' attorney), the defendant, on being applied to, had stated, that "he had received the note from a stranger at *Doncaster* races, in payment for bets won, or in change out of payment of bets lost." Another witness, to whom the defendant had paid over the note, said, that he told him that he received the note in question either from his bankers at *Oxford*, or at *Doncaster* races. No person was called to prove payment of the note by the bankers at *Oxford*.

The Lord Chief Justice directed the Jury to find for the defendant if they believed the last witness, as the defendant might have received the note from his bankers; if not, it was for them to decide whether the defendant had used a sufficient degree of caution in taking the note at *Doncaster*; and he said that a 30*l.* note would not require the same degree of caution in a party taking it, as one of a larger amount.

The Jury found a verdict for the plaintiffs.

Mr. Serjeant *Wilde*, on a former day in this Term, obtained a rule *nisi*, that this verdict might be set aside and a new trial granted.

Mr. Serjeant *Bosanquet* now shewed cause.—The plaintiffs are entitled to retain their verdict, as the defendant did not use sufficient caution in taking the note in question. In *Gill v. Cubitt* (a), it was held, that the Jury were properly directed to take into their consideration, whether the plaintiff had taken the bill of exchange (on which, the action was brought) under circumstances which ought to have excited the suspicion of a prudent and careful man; and they having found for the defendant, the Court refused to disturb the verdict. The Jury in this case have, by their verdict, decided that the defendant had not exercised sufficient caution in taking the note: he received it, according to the evidence of one of the witnesses, either from his bankers at *Oxford*, or from a stranger at *Doncaster* races—if from the former, further evidence should have been given of that fact—if from the latter, which was corroborated by the testimony of another witness, it is clear, that the defendant had not proceeded with due caution; he should have made some inquiries before he took, from a perfect stranger, on a race-course, a note which might have been obtained by fraud, theft, or finding. In *Gill v. Cubitt*, Lord Chief Justice *Abbott*, after commenting upon Lord *Kenyon's* judgment in *Lawson v. Weston* (b), observed, “if it is to be laid down as the law of the land, that a person may take a security of this kind from a man of whom he knows nothing, and of whom he makes no inquiry at all, it appears to me, that such a decision would be more injurious to commerce than convenient to it, by reason of the encouragement it would afford to the purloining, stealing, and defrauding persons of securities of this sort.” A race-course is a mart where stolen or lost notes may be readily disposed of; and, if this verdict were disturbed, it would tend to facilitate the passing away or circulating Bank of *England* or other

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(a) 3 Barn. & Cress. 466; S. C. 5 Dow. & Ryl. 324. (b) 4 Esp. Rep. 56.

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notes which have been lost or stolen. It may be said, that the present transaction occurred in the hurry and bustle of business; but that can be no excuse for want of proper caution. The defendant was a horse-dealer; no doubt in the habit of attending at races; and most persons, who do so, keep books containing accurate accounts of their bets, as well as the names and addresses of the persons with whom they bet; and a prudent man would certainly have entered a transaction of this nature in his betting-book; or, at least, he would have used more precaution than was shewn by the defendant on this occasion. The question, whether he had used due caution in taking the note, was most properly left to the Jury. A person who bets on a horse-race, ought not to be protected more than a mercantile person, or a tradesman in his shop; and if they took a note, or bill of the amount of the note in question, from a stranger, without making any inquiries, they would be liable to the consequences. Independently of this, a note should be received *bond fide*, and for good consideration; but securities given for bets at a horse-race are not founded on a good consideration; for although, by the statute 13 Geo. 2, c. 19, (explained and amended by 18 Geo. 2, c. 34), horse-races are legalized under certain restrictions, yet, by the statute 9 Ann. c. 14, s. 1, "all notes, bills, &c., or other securities, given by any person, where the whole or any part of the consideration of such securities shall be for money, &c., won by gaming or playing at cards, &c., or other game, or by betting on the sides of such as game at any of the aforesaid games, &c., shall be void;" and in *Blaxton v. Pye* (a) it was held, that wagers on horse-races are within this statute (b). The note in question, therefore, was clearly received for a bad consi-

(a) 2 Wils. 309.

ley, 2 Str. 1159. *Clayton v. Jen-*(b) See also *Goodburn v. Mar-*

nings, 2 Sir W. Bl. 706.

deration, and the defendant cannot be entitled to retain it as against the plaintiffs, the legal right of property being in them.

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Mr. Serjeant *Wilde*, in support of his rule.—The principal, if not the only question is, whether the defendant exercised a due degree of caution in receiving the note; and, taking all the facts of the case into consideration, there is no reason for saying that he did not. In the hurry and bustle at a race-course, it is impossible that the numbers or particulars of notes, or the names and addresses of parties, frequently strangers, from whom they are received, should be accurately taken. *Gill v. Cubitt* was the case of a bill-broker discounting a bill of exchange for a stranger, which is altogether distinguishable from the present—for a Bank of *England* note is equivalent to the current coin of the realm; whereas a bill of exchange is only a security for the payment of money by an individual, on the faith of whose credit alone the party is induced to discount the bill. The case of a tradesman has no bearing on the present; for a man behind his counter has leisure, as well as opportunity, to make inquiries, which a person who bets on a race-course cannot possibly have. The place or circumstances under which the note in question was taken, should have no influence on the Court, unless it were shewn that due caution was not used on the occasion. It is not usual to take down the addresses of parties in betting books at a horse-race, as those books are merely kept for the private satisfaction of parties, in order to assist them in the complicated state of accounts arising from such transactions. The usual course adopted on all such occasions, whether applying to a tradesman in his shop, or a person who bets on a race-ground, is the best criterion that can be adopted; and it would be absurd to expect the same degree of caution from a tradesman at a fair, as he might reasonably be supposed to exer-

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cise in his own shop. Here, there is no negligence or blame to be attached to the defendant, nor can any *mala fides* be imputed to him; his account of how he came by the note was an honest one, and remains unimpeached. The statute of *Anne* is altogether inapplicable, as it speaks only of *notes* and other such *securities*; and a Bank of *England* note is not in the nature of a security for payment of money, but is, in fact, the thing by which a payment is made, as it is equivalent to money. The defendant, therefore, is entitled to retain the note, or at all events, the question ought to be submitted to another Jury.

The Court granted a *new trial* on *payment of costs* by the defendant, on the terms of his taking short notice of trial at the adjourned Sittings after this term, and bringing the amount of the note into Court.

Rule absolute.

Friday,
June 9th.

CLEMENTS v. GEORGE.

SAME v. SAME.

The statute 24 Geo. 2, c. 18, s. 1, whereby the Judge, by certifying that the cause was a proper one to be tried by a special Jury, may relieve the party applying for such special Jury from the expenses, does not extend to a case where the record is withdrawn.

MR. Serjeant *Wilde*, applied for a rule *nisi*, that the Prothonotary might review his taxation in these actions, which were brought against the defendant, an underwriter, on two several policies of insurance. A special Jury had been appointed at the instance of the defendant in both causes, and a verdict having been found for him on the first, the plaintiff withdrew the record in the second, and the defendant's attorney paid the Jury for their attendance on both. The Prothonotary, on taxation, refused to allow the sum paid to the Jury on the second cause, as the Judge had not certified that it was a proper cause to be tried by a special Jury. The learned Serjeant submitted, that as this cause was not tried, through the act of the plaintiff, the defendant was clearly entitled to the costs of the special Jury.

Lord Chief Justice BEST.—The statute 24 Geo. 2, c. 18, s. 1, is imperative on this point; it is thereby enacted, that “the party who shall apply for a special Jury, shall not only bear and pay the fees for the striking of such Jury, but shall also pay and discharge all the expenses occasioned by the trial of the cause by such special Jury; and shall not have any further or other allowance for the same, upon taxation of costs, than such party would have been entitled to, in case the cause had been tried by a common Jury, unless the Judge *before whom the cause is tried*, shall, *immediately after the trial*, certify in open Court, under his hand, upon the back of the record, that the same was a cause proper to be tried by a special Jury.” Without a certificate, the expenses must be paid by the party applying for the special Jury; and without a trial there can be no certificate.

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Rule refused.

SELBY and Another v. EDEN.

THIS was an action of *assumpsit*, by the plaintiffs, as indorsees of a bill of exchange, against the defendant, as acceptor.

The first count of the declaration stated, that one *Nathaniel Atcheson*, on the 20th October, 1825, drew a certain bill of exchange, and directed the same to the defendant by the name and addition of *Ralph Eden, Esq., Hampstead Lodge, Newbury*; and thereby required the defendant, three months after date, to pay to the order of him the said *Nathaniel Atcheson*, in *London*, the sum of 498*l.* 15*s.*; which said bill of exchange the defendant afterwards, to wit, on &c., at *London* aforesaid, accepted, according to the usage and custom of merchants. The plaintiffs then averred an indorsement by *Atcheson* to them, and notice of such indorsement to the defendant;

Saturday,
June 10th.
If a bill of exchange be drawn payable at a particular place, and a party accept it, without stating that he accepts it there, and *not elsewhere*, according to the terms of the statute 1 & 2 Geo. 4, c. 78, s. 1;—*Held*, that this must be taken as a general acceptance, and no averment of presentment for payment at that place is necessary.

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by reason of which said premises, and according to the said usage and custom of merchants, the defendant became liable to pay to the plaintiffs the said sum of money in the said bill of exchange specified, according to the tenor and effect of the said bill of exchange, and of his said acceptance thereof. To this were added the common money counts, and the defendant pleaded the general issue.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings in the last Term, it was objected, on behalf of the defendant, that, as the bill was drawn payable to the drawer's order in *London*, there should have been an averment and proof of presentment for payment there. His Lordship, however, overruled the objection, and the plaintiffs obtained a verdict for the amount of the bill.

Mr. Serjeant *Bosanquet*, in the course of the same term, obtained a rule *nisi*, that the judgment on the verdict might be arrested, and he renewed the objection raised at the trial, and contended, that the case did not fall within the provisions of the late statute 1 & 2 *Geo. 4*, c. 78 (*a*), which only related to the regulation of *acceptances* of bills payable at particular places, and did not in the least refer to the place of payment mentioned by *the drawer* in the body of the bill; consequently, as the drawer here had made the bill payable in *London*, there

(*a*) By the first section of which it is enacted—"That from and after the 1st day of *August*, then next ensuing (1821), if any person shall accept a bill of exchange, payable at the house of a banker, or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill; but, if the acceptor shall, in his accept-

ance, express that he accepts the bill, payable at a banker's house, or other place only, and not otherwise or elsewhere, such acceptance shall be deemed and taken to be, to all intents and purposes, a qualified acceptance of such bill, and the acceptor shall not be liable to pay the said bill, except in default of payment, when such payment shall have been first duly demanded at such banker's house, or other place."

should have been an averment of a presentment there, or an excuse for the non-presentment; but, there was neither. It was, in fact, a general acceptance of a bill drawn payable in *London*; and, as the statute did not make any alteration in the effect of general acceptances, this must be considered as though it were a bill drawn and accepted previously to the passing of that statute; and, before the statute, if a bill had been drawn payable in *London*, a presentment to the acceptor there would certainly have been considered to be a condition precedent to any claim of the holder against him; or, at all events, an excuse must have been shewn why such presentment had not been made, as, for instance, that due diligence had been used to find the acceptor's place of business, but without success. In *Butterworth v. Lord Le Despencer* (a), where the declaration against the maker of a promissory note, payable at a particular place, averred a presentment at that place, and that the defendant, although often requested so to do, had hitherto refused, and still did refuse to pay; it was held well upon demurrer, and that a refusal at the particular place need not be averred, on the ground, that the presentment of the note at the place mentioned was a request there to pay the note; and that the non-payment at the place was a refusal of it. In that case, however, there was an averment of presentment at the particular place; but here, there was no allegation of a presentment in *London*, which was absolutely necessary, before the plaintiffs could be entitled to recover against the defendant as the acceptor.

Mr. Serjeant *Wilde* afterwards shewed cause, and submitted, that enough appeared on the face of the declaration to render the acceptor liable, and that it was not necessary to aver a presentment to him in *London*, being the place mentioned by the drawer in the body of the bill. The

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(a) 3 Mau. & Selw. 150.

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object of the statute 1 & 2 Geo. 4, c. 78 would be entirely defeated, if language used by the drawer, making a bill payable at a particular place, were not as much within the operation of the act, as language used by the acceptor for the same purpose. It is quite sufficient to state, that the bill was accepted by the defendant, by means whereof he became liable to pay the amount, for, generally speaking, a presentment for payment is not necessary to be averred in an action against the acceptor, except where a bill is expressly made payable at a particular place, as in *Rowe v. Young* (a). Besides, independently of the statute, it is not necessary for the holder, as against the acceptor, to present a bill on the day it becomes due, as the latter is always liable. In *Turner v. Hayden* (b), where the holder of a bill of exchange, accepted payable at a banker's, but not made payable *there only*, did not present it for payment, and the banker about three weeks afterwards failed, having had in his hands, during all that time, a balance in favour of the acceptor, exceeding the amount of the bill; it was held, that the latter was not discharged by the omission to present the bill for payment, the acceptance being in law a general acceptance. Here, the defendant, by his acceptance, undertook to pay in *London*, the bill being made payable there by the drawer; it must therefore be inferred, that he was requested to pay there, for the action itself is a sufficient demand; and the holder is not limited to the *place* in making it. In *Rolle's Abridgment* (c), and *Comyns's Digest* (d), it is said: "If a condition be to do an act at such a place upon request, the request may be in any place." So, in this case, it was not necessary for the plaintiffs to shew a request on the defendant in *London*; if the request were made in *Middlesex*, it would be sufficient. If a person

(a) 2 Brod. & Bing. 165.

N. 5, l. 20.

(b) 4 Barn. & Cress. 1.

(d) Vol. 3, p. 104, tit. *Condi*(c) Vol. 1, p. 443, tit. *Condition*, G. 9.

accept a bill drawn on him in terms similar to the present, he cannot afterwards require a further designation of the place where demand of payment may be made; for, in *Mutford v. Walcot* (a), Lord Chief Justice *Holt* said:—
 “There must be such an acceptance as will bind the acceptor, and that is sufficient. As, if a bill of exchange be payable at *London*, and the person upon whom it is drawn accepts it, but names no house where he will pay it, the party that has the bill is not bound to be satisfied with this acceptance; but nevertheless, if he will be content with it, it will bind the acceptor.” Besides here, a request to pay the plaintiffs according to the terms of the defendant’s acceptance, must be taken as proved after verdict. In *Huffam v. Ellis*, (in error) (b), an averment that a bill accepted payable at a banker’s was, when due, presented at the banker’s for payment, according to the tenor and effect of the bill, and of the acceptor’s acceptance thereof, and that as well the banker as the acceptor refused payment, was held to be supported after judgment, on a sham plea; and it was also held, that it should be intended, that the bill was presented for payment to the acceptor himself at the house of those persons; for that evidence of those facts would be admissible under such an allegation, and not repugnant to it. Therefore, whether considering this case to come within the operation of the statute 1 & 2 *Geo.* 4, or not, there is no ground to arrest the judgment.

Mr. Serjeant *Bosanquet*, in support of his rule, submitted that the plaintiffs must allege a presentment for payment to the acceptor, at the place where the bill was expressly made payable by the drawer in the body of the bill; for such a bill, so framed, could not be said to be payable

(a) 1 *Ld. Raym.* 574; *S. C.* 1
Salk. 129, 12 *Mod.* 410.

(b) 3 *Taunt.* 415.

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generally, but only within a particular district. Although it may be stated as a general rule, that, as against the acceptor of a bill, a presentment for payment may be presumed; yet, in *Bayley on Bills* (a), it is stated, that "if a bill or note is made payable at a particular house, that house is the proper place at which to make the presentment, whether such house be mentioned in the body of the bill or note, or in a marginal note only, or in the acceptance only. And if such house be mentioned in the body of a note, a presentment there is necessary even to charge the maker." And the cases of *Sanderson v. Bowes* (b), *Dickinson v. Bowes* (c), and *Howe v. Bowes* (d), are cited in support of the latter part of the above position, which will equally apply to the case of an acceptor of a bill of exchange. In *Rowe v. Young* (e), it was decided, that, in an action by the indorsee against the acceptor, where the bill was directed to the defendant at *Tor Point, Devon*, and the declaration alleged that he accepted it payable at a banker's in *London*, and the plaintiff had judgment, on error, an objection was taken, that there was no averment of presentment for payment at the banker's; and the House of Lords held the objection fatal, and the judgment for the plaintiff below was reversed; and Lord *Eldon* there said (f):—"If you go back to principle, and admit that a man may give a qualified acceptance, the question is, whether this is a qualified acceptance, aye or no? If it be a qualified acceptance—If it be an acceptance where the contract of the party is to pay at the banker's,—then I state it to be in pleading settled matter, that you must declare according to the contract, and that you must aver all that the nature of that contract makes necessary. If that be so, if it be a special

(a) Page 174-5, 4th edit.

5 Taunt. 30.

(b) 14 East, 500.

(c) 2 Brod. & Bing. 165.

(c) 16 East, 110.

(f) Page 175.

(d) 16 East, 112; S. C. in Error,

contract, and if it be necessary for you to aver all which the contract contains, how can it be said that it is not to be shewn in the nature of the demand, but that it must be left to be shewn in the defence? It appears to me that this position cannot be maintained." And Lord *Redesdale*, in the same case observed (a)—"If the words which have been added to this acceptance be construed as having no operation in favour of the acceptor, how came they to have any operation whatever in favour of other parties? If there be not a condition annexed to the acceptance, how can it be granted, that the holder of the bill must, in order to entitle him to make a demand, either against the drawer or against the indorser, shew the bill to the bankers? But it is said, that this should be shewn in the plea. The majority of the Judges have been of opinion, that it is a qualification of the acceptance, but that the party is to take advantage of it in pleading. But, in order to do that, he is obliged to bring the money into Court, that is to say, he is to do the very thing which (in the case of an acceptance in *India*, for instance), he ought not to be obliged to do; for, in that case, the acceptor must bring the money from *India*, to be enabled to bring the money into Court. Upon these grounds, it appears to me, that it is infinitely better to hold, that these words do amount to a qualification of the acceptance, imposing a precedent condition, which must be shewn upon the record, for the purpose of setting forth truly the acceptance, and, that being set forth, it appears to me, that the party is bound to prove that which he has averred in the declaration, which goes to shew, that the party taking such acceptance has complied with the condition entered into between him and the acceptor." In that case, the want of averment of presentment was not cured by verdict; and, in *Rushton v. Aspinall* (b), in an action against

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(a) Page 179.

(b) 2 Doug. 679.

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the indorser of a bill of exchange, where the plaintiff had not alleged a demand, and refusal by the acceptor, on the day the bill became due, it was held to be error and not cured by verdict. As, therefore, the statute 1 & 2 Geo. 4, applies to acceptances only, and as the acceptance in question cannot be considered a general acceptance, we must revert to the established and recognized principle, by which a presentment for payment to the acceptor in *London* should have been averred in the declaration, the bill having been made payable there, by the express terms in which it was drawn.

Cur. adv. vult.

Lord Chief Justice BEST now delivered the judgment of the Court. After reading the first count of the declaration, his Lordship proceeded—It is unnecessary for us to consider whether, independently of the late statute of 1 & 2 Geo. 4, c. 78, it was necessary for the declaration to contain an averment of presentment for payment to the acceptor in *London*, or an excuse for not presenting it there; as we are unanimously of opinion that the defect or omission is cured by the statute in question. It is true, that the preamble does not relate to such a transaction as the present, as it is confined to the regulation of mere acceptances of bills; but, if the whole of the statute is looked at, there can be no doubt but that the present bill is brought within the pale of the act, which, being a remedial statute, should receive a large construction; the words of the enacting clause are—“If any person shall accept a bill of exchange, payable at the house of a banker, or *other place*, without further expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill.” Although, therefore, if we were to look at the preamble only, we might say, that the legislature intended to limit the effect

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of the statute to cases where the terms of the contract were contained in the acceptance of the bill; yet, we are not bound by the preamble, but must look to the enacting clause, which seems to us to extend the effect of the preamble, and to embrace every transaction, where a bill is made payable at a particular place; the words are—"If a person shall accept a bill, *payable* at a banker's *or other place*," that is to say, if a party has contracted that a bill should be paid at any particular place, whether the contract is so made by the acceptor when he accepts the bill, or the drawer when he makes it, it is to be considered as a mere general acceptance, unless certain words contained in the statute are added to the terms of the contract. I thought at first that the statute required a different construction, but I have since changed my opinion, and think, that if a bill be drawn payable in *London*, and the party accepts it as drawn, it must be taken as a general acceptance, unless the acceptor himself avows, that he intends to confine his liability within the city of *London*, by stating, in the terms of the statute, that he accepts the bill, payable in *London*, "*and not elsewhere*." The defendant has not done this, nor negatived his liability to pay generally. We are therefore of opinion, that this acceptance must be considered as a general acceptance; and that an averment of presentment to the acceptor for payment in *London* was not necessary.

Rule discharged (a).

(a) The same point was determined in the Court of King's Bench, in *Fayle v. Bird*, 6 Barn. & Cress. 531.

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June 12th.

The defendants sent an agent to *Mexico*, to purchase interests in mines, and payments were made on behalf of the defendants, to carry on the transactions, which were provided for by bills drawn by a sub-agent on the defendants, and with their authority and consent. Before the bills were presented for acceptance, the defendants had transferred their interests in the mines to a company, who would have provided for the bills, but one of the defendants requested their agent, who then acted for the Company, that funds might be placed in the defendants' hands to take up the bills, stating, that it would be unpleasant to have the bills drawn upon their firm paid by a third party; upon which it was agreed that the defendants should have the money for the purpose of paying the bills,

which were left at their house for acceptance, but not accepted; and when the agent complained to one of the defendants on the subject, he expressed his surprise, and said, that they had had the money, and that the bills ought to be paid:—*Held*, that this amounted to a parol acceptance, and that the defendants were liable to pay the amount of the bills to an indorsee, although he had in ignorance protested the bills for non-acceptance.

FAIRLIE and Others v. HERRING, GRAHAM, and POWLES.

THIS was an action of *assumpsit*. The declaration contained two special counts. The first was upon a bill of exchange, drawn by one *Richard Exter*, in *Mexico*, dated 31st *January*, 1825, upon, and accepted by the defendants. The second count was upon a promissory note, signed by the defendants by means of *Richard Exter*, their agent. The declaration also contained the usual money counts.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the sittings after the last term, a verdict was found for the plaintiffs, subject to the opinion of the Court upon the following case:—

“ The plaintiffs are merchants in *London*, trading under the firm of *Fairlie, Bonham, & Co.* The defendants are also merchants in *London*, trading under the firm of *Herring, Graham, & Powles*.

“ The first witness called on the part of the plaintiffs proved the hand-writing of *Exter*, the drawer of the bill, which was as follows:—

“ No. 50. For £1,000 sterling.

“ *Mexico, Jan. 31, 1825.*

“ Sixty days after sight of this my first of exchange (second and third, of same number, tenor, and date, being unpaid), pay to the order of Messrs. *Herrera & Ritchie*, the sum of £1,000 sterling, for value received, and advanced me for the mines in *Guanaxuato*.

“ *Richard Exter*, sub-attorney.

“ To Messrs. *Herring, Graham, & Powles*,
Freeman's Court, Cornhill, London.

(Indorsed) “ ‘ Pay to Messrs. *J. Scott & Co., Calcutta*, or to their order,

“ ‘ *Feb. 25, 1825.*’

“ ‘ *Herrera & Ritchie.*’

“ ‘ Pay to Messrs. *Fergusson & Co.*, or order,

“ ‘ *J. Scott, & Co.*’

“ ‘ Pay to Messrs. *Fairlie, Bonham, & Co.*, or order,

“ ‘ *Fergusson & Co.*’

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“ Other of the plaintiffs’ witnesses proved the handwriting of *Herrera & Ritchie*; also of the firm of *Scott & Co.*, and of *Fergusson & Co.*, indorsers of the bill; and the presentment to the defendants for acceptance on the 3rd *January* last; that the bill was left with them, and was afterwards obtained back, but was not accepted.

“ Another witness on the part of the plaintiffs, of the name of *Mornay*, stated, that he went out to *Mexico* at the latter end of 1823, for the purpose of embarking in the exploitation of mines on account of the defendants, as well as for the purpose of purchasing interests in mines for them, and of carrying on the business there; that *Exter* was there also, and was an agent; that he, *Mornay*, acted as the agent of the defendants as well as *Exter*; that the defendants knew that *Exter* had been acting as such; that payments had been made on account of the mines in *Guanaxuato*, for the defendants, to the amount of 50,000 dollars, and that the amount was raised by bills; that *Mornay* knew this by communication with *Exter* and the defendants; and that the bill in question had been frequently the subject of discussion with the defendants; that it was one of many bills composing the amount of 50,000 dollars, which bills were drawn by *Exter*, under authority from *Mornay*; that the defendants knew from *Mornay* the manner in which *Exter* had

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drawn these bills, and that they invariably approved of it; that it was stated by the defendants that they were to pay the bills, and that it was a matter taken for granted; that there was a discussion between the *United Mexican Mining Association* and the defendants as to the purchase of certain interests in mines; and that there was a settlement of account simultaneously.

“ The account was produced, in which were the following items, *vis.*, on the credit side—

“ 1825. Jan. 31, Drafts, *Richard Exter*, 50 to 63, *Herrera & Ritchie*. 11,458*l.* 6*s.* 8*d.* Dollars, 50,000.

And on the debit side—

“ ‘ Remittances to the Northern Provinces, to be accounted for by *Richard Exter*, of Mexico.

Dollars, 35,000.’

“ The witness, *Mornay*, further swore, that the account was drawn up by him, and handed, with an account of his administration, in the regular course of business, but not preparatory to the arrangement with the Company; that the bills were to be paid, but whether the defendants should pay them personally, or whether the payment should be made by the Company, depended on the arrangement to be finally made with the Company; that the bills came into discussion during the negotiation with the Company. That it was by word of mouth *Mornay* gave consent to the defendants’ holding the money, and that the general arrangement was made by deeds. That the arrangement who was to pay the bills was also transacted by parol, and was made with *Mornay’s* consent verbally, and would not have been made without; and that he consented to the money being lodged in the hands of the defendants by the Company, to the amount of 11,458*l.* 6*s.* 8*d.*, for the purpose of paying the bills before mentioned. That, after all had been concluded, with the

impression that the money should remain in the hands of the Company to meet the bills when they appeared, the defendant *Powles* came to *Mornay*, and asked his consent that the 11,458*l.* 6*s.* 8*d.* should be left with him for the purpose of taking up the bills; and he said that the Company would not do it without his, *Mornay's*, consent, and that it would be unpleasant to have bills drawn upon the defendants paid by a third party; and *Powles* added, that *Mornay* could surely trust the defendants with 11,000*l.*, after they had trusted *Mornay* with a much larger amount. That *Mornay* assented and agreed they should have it for the specific purpose of paying these bills.

“ On *Mornay's* cross-examination, he stated, that the defendants had never expressed dissatisfaction at his conduct; that, when he went upon the business before mentioned, he had a written authority, *viz.* a power of attorney, which he acted under while in *America*; that he gave *Exter* a written authority, and that *Exter* acted under a power of attorney from *Mornay*, substituting the powers which he held; that the arrangement between the defendants and the company were carried into effect by writing, which they respectively executed; that about *August*, 1824, goods to the amount of 35,000 dollars were purchased with the money of the defendants, and sent by *Mornay* to the care of the correspondents of *Exter* at *Rosario*; that *Exter* had not accounted for those goods to the defendants; that, upon one occasion, there was a conversation respecting them; but that it was not upon condition that *Exter* should account to the defendants for them that the money was deposited with the latter, or that they were to pay the bills; that, at the time the defendants talked of paying the bills, something was said about the goods, but no question was raised whether the bills should be paid or not, either contingently or otherwise; that it was taken for granted that the defendants were to pay the bills, and that *Exter*, the drawer, would

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account for the proceeds of the goods; that the 35,000 dollars applied in the purchase of the goods sent to *Rosario* were placed to the debit of the defendants in *Mornay's* account with them; that the only reason he, *Mornay*, knew why *Ester* did not account, was, that he would pay over the proceeds when his liability upon the bill in question, and others which he had drawn for them, had ceased, and that he would not pay the proceeds over till then; that since all these arrangements, the witness *Mornay* had had conversations with the defendant *Herring* on the subject of paying these bills, and informed him of their not being accepted, when *Herring* said—'What! not accepted? We have had the money; they ought to be paid: but I don't interfere in this business; you should see Mr. *Powles*.' That *Mornay* accordingly went to Mr. *Powles*; that he saw the defendant *Herring* again there, when he said, 'there were circumstances which would prevent paying these bills.'

"Supposing *Ester* had accounted for the proceeds of the goods, they, according to the order before-mentioned, would have certainly arrived in this country before the bills came round from the *East Indies*; and it was known that the bills were gone round by the *East Indies*.

"A notary public proved, that the bill in question had been noted for non-acceptance on the 7th *January* last, and afterwards protested for non-acceptance, in consequence of an order given on the 24th *January* last; and *Mornay* swore that he had not made any communication to the plaintiffs before that day."

If the Court should be of opinion that the plaintiffs were not entitled to recover, the verdict found for them was to be set aside, and a nonsuit entered. But, if the Court should be of a contrary opinion, then the verdict was to stand.

The case now came on for argument—

Mr. Serjeant *Spankie*, after reading *Mornay's* evidence, contended, that the plaintiffs were entitled to retain the verdict, on three grounds:—*First*, that, under the circumstances, there had been a parol acceptance of the bill in question. *Secondly*, that the instrument might be considered as a promissory note; and there being a count in the declaration treating it as such, that the plaintiffs were entitled to recover thereon. And *thirdly*, that, at all events, they were entitled to recover on the count for money had and received.

First, treating the instrument as a bill of exchange, there was a good parol acceptance of it by the defendants; and, as it was drawn abroad, the late statute of 1 & 2 Geo. 4, c. 78, s. 2, which was passed for preventing parol acceptances, does not apply, as that statute is confined to inland bills only. It was decided, in *Lumley v. Palmer* (a), that evidence of a parol acceptance of a bill of exchange is sufficient to charge the drawee as the acceptor; and in *Cox v. Colman* (b), where a foreign bill was drawn upon the defendant, and returned and protested for non-acceptance, and afterwards the defendant said to the plaintiff, “if the bill comes back I will pay it;” this was held a good acceptance. The law, therefore, remaining untouched by the late statute with regard to foreign bills, the acceptance of such instruments may still be by parol. The question then is, whether the facts constitute a parol acceptance. There may be a constructive acceptance, which may arise from the conduct of the parties, as in retaining a bill, and in such a case the acceptance may be valid. It is true, indeed, that it was decided in *Rees v. Warwick* (c), that an answer by the drawee, in reply to a letter of advice from the drawer,

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(a) Cas. temp. Hardw. 74; S. C. 2 Str. 1000.

(b) Cas. temp. Hardw. 75, n.

(c) 2 Stark. Rep. 411; S. C. 2 Barn & Ald. 113.

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desiring that the bill might be honoured, that it *should have attention*, did not amount to an acceptance; yet the ground, as was observed by Lord Chief Justice Abbott, in giving judgment, was, that the phrase, "*shall have attention*," was at least ambiguous. Here, however, there was no ambiguity in the expression used by the defendant *Herring*, at the time he was applied to by *Mornay*, as he said, that, although the bills were not accepted, they ought to be paid. In *Wynne v. Raikes* (a), where a letter, from the drawees of a bill in *England* to the drawer in *America*, stated, that, "their prospect of security being so much improved, they should *accept or certainly pay the bill*," it was held to be an acceptance in law, although the drawees had before refused to accept the bill, when presented for acceptance by the holder, who resided in *England*; and again, after the writing of such letter, they refused payment of the bill when it was presented for payment; and although such letter, written before, was not received by the drawer in *America*, until after the bill became due:—and Lord *Ellenborough* said (b): "A promise to accept an existing bill, is an acceptance. A promise to pay it, is also an acceptance. A promise therefore, to do the one or the other, i. e. to *accept or certainly pay*, cannot be less than an acceptance." So, in this case, the bill had been drawn by *Eater*, at the time the defendant *Herring* admitted that it ought to be paid, and that money had been received by him and his partners for that purpose. This admission, therefore, clearly amounted to an acceptance. In *Clarke v. Cook* (c), where *A.*, in consideration of having commissioned *B.* to receive certain *African* bills payable to him, drew a bill upon *B.* for the amount, payable to his own order; and *B.* acknowledged by letter the receipt of the list of the *African* bills, and that *A.* had drawn for the amount, and assured him that it would meet

(a) 5 East, 514.

(b) *Ib.* 520-1.

(c) 4 East, 57.

with due honour from him: it was held to be an acceptance of the bill by *B.*; and the purport of such letter having been communicated by *A.* to third persons, who, on the credit of it, advanced money on the bill to *A.*, who indorsed it to them—it was held that *B.* was liable, as acceptor, in an action by such indorsees, although, after the indorsement, in consequence of the *African* bills having been attached in *B.*'s hands, who was ignorant of his letter having been shewn, *A.* wrote to *B.* advising him not to accept the bill when tendered to him, which, as between *A.* and *B.* would have been a discharge of *B.*'s acceptance, if the bill had still remained in *A.*'s hands. The facts proved by *Mornay* in this case go much further, and are conclusive to shew that the defendants consented by parol to accept the bill, having expressly acknowledged, that they had received the money for it, and that it ought to be paid.

It may be contended, however, that the protest by the plaintiffs for non-acceptance is a waiver of the acceptance; but the protest having been made in ignorance of such acceptance, *Mornay* having made no communication to them on the subject, it could not affect them. Although, in *Sproat v. Matthews* (a), where a bill was drawn upon *A.* residing in *London*, by a consignor of goods living abroad; and, on its being presented for acceptance, *A.* said, he could not then accept it, because he did not know whether the ship in which the goods were, would arrive at *London* or *Bristol*, and *B.*, the holder of the bill, agreed to leave it for some time, reserving the liberty of protesting it for non-acceptance from that day, in case *A.* did not accept; and on a second application, *A.* said the bill would be paid, even if the ship were lost; this was held to be only a conditional acceptance, and that *B.*, having the liberty of refusing such conditional acceptance, precluded himself from recovering

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(a) 1 Term Rep. 182.

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against *A.*, by afterwards noting the bill for non-acceptance:—and although in *Bentinek v. Dorrien* (a), where an acceptance was cancelled by the drawee before the bill was delivered back to the holder, and he caused it to be noted for non-acceptance, it was held, that he could not afterwards sue upon it as an acceptance: yet in both those cases the protest had been made with a full knowledge of all the facts attending the bills, whilst here, the plaintiffs had protested the bill in ignorance of the circumstances that had transpired between their agent, *Mornay*, and the defendant *Herring*, and therefore they cannot be estopped by such protest.

Secondly, the instrument on which the present action is founded, although in form a bill, may be considered in its legal operation as a promissory note; being made by the defendants through their agent, and by which they were to pay Messrs. *Herrera & Ritchie* 1,000*l.* for value received by such agent; and in *Morris v. Lee* (b), it was held, that no particular form of words is necessary to make a bill of exchange or promissory note.

Thirdly, the plaintiffs are, at all events, entitled to recover on the count for money had and received; as there was a clear and express appropriation by the defendants of the money for the payment of the bill; and one of them, on expressing his surprise that it had not been accepted; said that they *had had the money*, and that the plaintiffs ought to be paid. A difficulty has indeed arisen in other cases, with regard to the privity of contract between the parties:—and *Williams v. Everett* (c) may be relied on, to shew that the plaintiffs could not maintain an action against the defendants, for money had and received by them to the plaintiffs' use; but in

(a) 6 East, 199.

1 Str. 629; 8 Mod. 362.

(b) 2 Ld Raym. 1396; S. C.

(c) 14 East, 582.

that case Lord *Ellenborough* said (a): "If, in order to constitute a privity between the plaintiff and defendants, as to the subject of their demand, an assent, express or implied be necessary, the assent can in this case be only an implied one, and that, too, implied *against the express dissent* of the parties to be charged." Here, however, so far from a dissent, there was an express acknowledgment by the defendant *Herring*, of the receipt of the money, and which was to be appropriated to the payment of the bill; and this assent admitted a privity of contract between the plaintiffs and defendants. The defendant *Powles* had required money to take up the bill; and the sum which he received for that purpose could be held by him for no other. The case of *Tatlock v. Harris* (b) is in point; there, a bill of exchange was drawn by the defendant and others on the defendant alone, in favour of a fictitious person, (which was known to all parties concerned in drawing the bill), and the defendant received the value of it from the second indorser: it was held, that a *bona fide* holder for a valuable consideration might recover the amount of it in an action against the acceptor for money paid, or money had and received. In this case, the facts clearly shew, that the money was to be held by the defendants to meet this and other bills, otherwise it would be a clear fraud; and there was a positive assent to hold the money for that purpose. *Surtees v. Hubbard* (c), fortifies the case of *Tatlock v. Harris*: it was there decided, that if a party, indebted to another, consent to pay over the money to a third person, the latter may maintain *assumpsit* for it; and Lord *Ellenborough* there observed (d): "Choses in action generally, are not assignable. Where a party entitled to money assigns over his interest to another, the mere act of assign-

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(a) 14 East, 597.

(c) 4 Esp. 203.

(b) 3 Term Rep. 174.

(d) Ib. 204.

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ment does not entitle the assignee to maintain an action for it. The debtor may refuse his assent: he may have an account against the assignor, and wish to have his set-off: but, if there is any thing like an assent on the part of the holder of the money, in that case, I think, that an action for money had and received, which is an equitable action, is maintainable." In *Redshaw v. Jackson* (a), which was an action for money had and received, the plaintiff was indorsee of a bill of exchange accepted by the drawees, and he gave in evidence an acknowledgment by the defendants, of having received from the acceptors a sum of money sufficient to satisfy the bill; the defence was, that the bill, which had been drawn by the drawers payable to their own order, had been indorsed by them to the plaintiff, after an act of bankruptcy, or at least in contemplation of bankruptcy, and with a view to give him a fraudulent preference; and Lord *Ellenborough* said (b): "As it was through the medium of the bill of exchange, that the plaintiff made out his right to the money in the defendants' hands, by impeaching his title to the bill, they shewed that he had no cause of action against them; and that, though they had this sum of money in their hands, it was not for his use, but for the use of the assignees of the drawers, or whoever might be legally entitled to the bill." But the bill here is evidence to shew that the money was held by the defendants for the holder of the bill, his title to it being unimpeached. In *Stevens v. Hill* (c), which was an action against the drawee of a bill of exchange, made payable out of a particular fund—the bill was not accepted by the drawee, who was the agent of the drawer, but he said to the plaintiff when the bill was presented for acceptance, that he had no money belonging to the drawer in his hands, but that he would pay it out of the drawer's mo-

(a) 1 Camp. 372.

(b) *Ib.* 373.

(c) 5 Esp. Rep. 247.

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money when he received it; and on proof of the receipt of such money by the defendant, an action for money had and received was held to be maintainable against him. So, in this case, although there was no regular or written acceptance, there was a distinct admission on the part of the defendant *Herring*, that the money had been received, and that the bill ought to be paid. In *De Bernales v. Fuller* (a), money had been paid to the defendants (bankers), by the acceptor's clerk, for the purpose of meeting a bill, but they had kept the money, having a lien, as they supposed, upon it, in consequence of some account between the acceptor and them; but the Court held, that the money having been expressly paid into their house for the specific purpose of taking up the bill, it must be taken to have been received at the time for the use of the holder of the bill. A person may constitute himself an agent, by circumstances from which such agency may be implied; and if, in that character, he receives money, he cannot afterwards abandon it, and claim to retain it for another purpose. Here, the appropriation was complete, on the authority of *Tatlock v. Harris*, and the money was received by the defendants for a particular purpose, and at their own request. In *Rolle's Abridgment* (b), it is said, if *A.* give goods to *B.*, of the value of 80*l.*, out of which he should pay to *C.* 20*l.*, if *B.* does not pay the 60*l.* to *C.*, that *C.* may have an action on the case against *B.*, and declare that he was indebted to him in 20*l.*; for that, when goods of the value of 80*l.* are given to *B.* by agreement between him and *A.*, that he should pay 20*l.* to *C.*, this becomes a debt to *C.*, as if *A.* delivered 20*l.* to *B.* to pay over to *C.*

Mr. Serjeant *Wilde* for the defendants.—Whatever may have taken place on the subject of the bill in ques-

(a) 14 East, 590, n.

(b) Vol. 1, p 32, l. 27.

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sion, (as the transaction was entirely confined to the defendants, and parties who were strangers to the plaintiff, no right of action can have accrued to the latter; and the objection applies to the acceptance, as well as to the plaintiff's claim for money had and received by the defendants for their use. The first question is, whether the defendants have promised to accept the bill, or have accepted it in such terms as to give the plaintiff a right of action thereon. The promise of the defendant *Herring* to *Mornay* cannot apply, as the latter was no party to the bill, *Ester* being the drawer. The *Mexican Company* made no complaint, nor was there any communication between them and the plaintiffs. So, the Company were no parties to the bill; and it was wholly immaterial to them, whether it was paid by the drawer *Ester*, or by the defendants, his principals. If a contract be made between two parties, and a third intervene, he must shew in what manner he has obtained a right to sue for the breach of such contract. Here, the agreement was between the Company and the defendants, and the plaintiffs were utter strangers to them, not having been the holders of the bill at the time of the agreement, nor was there any arrangement made between them and any party to the bill. In *Boyley on Bills*, it is laid down (a), that "a promise to accept an existing bill, if made upon an executed consideration, or if it influence any person to take or retain the bill, in which case the statute 1 & 2 Geo. 4, c. 78, s. 12, does not apply, a complete acceptance as to the person to whom the promise is made in the one case, and the person influenced in the other, and as to all the subsequent parties in each;" and that principle is borne out by a number of authorities there referred to. A promise to accept must be made to a party to the bill, and cannot have any reference to others who have merely a collateral connec-

(a) 4th Edit. p. 142.

tion with the instrument. In *Rees v. Warwick* (a), the drawer of a bill wrote to the drawee, stating that he had valued on him for the amount, and added, "*which please to honour;*" to which the drawee answered, "*the bill shall have attention;*" and it was held that these words did not amount to an acceptance; inasmuch, as although an acceptance may be made by a letter to a drawer, still that can only be so, where the terms of the letter do not admit of doubt. In that case too, the letter was written by the drawee in answer to the drawer; and there was no promise to a third person, as is attempted to be set up by one of the defendants to *Mornay* in this case. So, in *Wynne v. Raikes* (b), which was determined on the authority of *Powell v. Mansier* (c), there was a correspondence between the drawer and drawee of the bill; and a promise by the latter to the former:—and in *Clarke v. Cook* (d), there was a direct communication between the parties to the bill. There is no case where a promise to accept, made to a third person not a party to the bill, has been held to amount to an acceptance; and here it does not appear that the plaintiffs were the holders of the bill, at the time of the conversation between *Mornay* and the defendant *Herring*. The late statute was made to remedy the inconvenience of making a party liable on a written contract by a parol conversation or admission which might before have amounted to an acceptance. By law, there must be a privity between the parties to whom a security is given, and those who are to be bound by the contract; and here there was no privity of contract, as there was no acceptance in writing, and the promise to accept was made to a stranger; for, as *Mornay* was not a party to the bill, he was not in a condition to require an accept-

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(a) 2 Barn. & Ald. 113.

(b) 5 East, 514.

(c) 1 Atk. 611.

(d) 4 East, 57.

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ance. As to the plaintiffs being entitled to recover on the count for money had and received—

[Lord Chief Justice *Best*.—The Court will not decide that point.]

Supposing then, that the acceptance may be considered as a valid acceptance, the plaintiffs having, by their protest, treated the bill as not being accepted, they have made their election, by which they must be bound; and there is no pretence whatever for saying, that it may be treated as a promissory note.

Mr. Serjeant *Spankie*, in reply, was stopped by the Court.

Lord Chief Justice *Best*.—We are all of opinion, that there has been a good acceptance of the bill in question, and it is therefore unnecessary to consider whether the plaintiffs are entitled to recover on the count for money had and received.

It is material, in the first place, to ascertain the facts, and when they are once understood, there can be no doubt but that, both in justice and in law, the plaintiffs are entitled to recover. These facts depend on the testimony of *Mornay*, the agent of the defendants in *America*, where he was sent by them for the purpose of exploiting mines. He there made an arrangement with the United Mexican Mining Association; in the course of which, the defendants had the benefit of the money for which the present action was brought. The bill in question was given, among others, as a security for that money, and was drawn by *Exter*, the sub-agent of *Mornay*, who was the authorized agent of the defendants. The bill was therefore drawn upon them for the purpose of being paid by them, as they had had, through their agent, the benefit of the money, and the advantage of the bargain with the

Mexican Company. In justice, therefore, the defendants ought to pay. But on the other hand, it is contended that, by law they are not compellable so to do; yet as one of them, (*Herring*), told *Mornay*, that the bill ought to be paid, the law can enforce such payment, the defendants having received the money, and had all the advantages for which the bill was drawn. The business, on the part of the *Mexican Company*, being under the control of *Mornay*, the agent for the defendants, one of them, *Powles*, applied to *Mornay*, and begged that he would consent to their having a certain sum of money for a stipulated purpose, namely, the payment of this and other bills of exchange drawn by *Exter*, under the authority of *Mornay*; complaining that it would be a hardship to have bills drawn on their firm paid by any other house—that it would bring discredit on their firm; and that *Mornay* might surely trust them, the defendants, as they had trusted him to a much larger amount. This was a distinct and direct promise to pay the bills, and was certainly founded on a good consideration, inasmuch as the defendants could not have obtained the money without having made such promise. The promise to pay the bill has not been denied; but my brother *Wilde* has contended, that this case is distinguishable from all those where a parol promise has been held to amount to an acceptance, because the promise was not made to one of the parties to the bill. But I consider that, under the circumstances, it may be considered as a promise made to a party to the bill; *Exter* was the drawer and the sub-agent of *Mornay*, who was the avowed and recognized agent of the defendants. *Exter* and *Mornay*, therefore, must be considered as one and the same person, and as the promise was made to the latter, it was virtually a promise to the former, (the drawer), to pay the bill; and if a drawee promise to pay a bill, he promises to do all the formal parts; he promises to accept as well as

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to pay. As, therefore, there was a promise by one of the defendants, founded on a good consideration, to pay the bill, and made to a party under whom the drawer acted, the plaintiffs may avail themselves of it; for, if a person becomes possessed of a bill which has been accepted by parol, although he does not know it at the time, he may still recover against the drawee, as he takes the bill with all the advantages the previous holder was entitled to derive under it; and if any party once had the advantage of a parol acceptance, a subsequent holder is entitled to avail himself of it. The promise, therefore, by one of the defendants, being made to *Mornay*, who must be considered as one of the parties to the bill, and made on an adequate consideration, what pretext can there be to prevent the plaintiffs from availing themselves of such promise?

But it has been contended, that because they protested the bill for non-acceptance, they are precluded from afterwards having resort to the drawees upon a mere parol acceptance. At the trial, I left it to the Jury to say, whether this protest had been made in ignorance of such parol acceptance; and they expressly found that it had, and that the plaintiffs had been wholly ignorant of what had previously taken place between *Mornay* and the defendants. Therefore, we ought not to hold, that an act done by the plaintiffs, in ignorance of certain rights before vested in them, should in any way prejudice those rights. Ignorance of a particular fact cannot affect a just right. It is unnecessary to refer to any cases on the subject, as I take the principle, deducible from all the authorities, to be, that if a man upon whom a bill is drawn undertakes to pay it, he also undertakes to accept it; and such an undertaking, on the equity side of the Hall, is considered as an actual acceptance. As the plaintiffs, therefore, have done nothing to waive their right, the law will allow them to recover what, in justice, they are clearly entitled to; and it would

be a disgrace to our law, if, upon a bill drawn by an agent of the defendants, they having had the advantage of the money for which it was drawn, they could turn round and say—our agent is not a fit person to be trusted; it is true, we have had the money to pay the bill, but we do not intend to do so. I am glad to find, that the statute 1 & 2 Geo. 4, does not interfere, as it applies only to acceptances of inland bills; and therefore the law will enable us to do the plaintiffs that justice, to which it appears to me they are so clearly entitled.

Mr. Justice PARK.—I am of the same opinion. The principal question in this case is, whether or not there has been an acceptance of the bill in question; and as, I believe, we all think that there has, we need not discuss the question—whether an action would lie for money had and received? If this had been necessary, I should have required further time to consider that point. The second point is certainly not tenable; as the instrument in question cannot possibly be converted into a promissory note. With regard to the question as to the acceptance, I do not understand my brother *Wilde* to have denied that what was said by one of the defendants did not amount to an acceptance; at all events, the cases to which we have been referred, clearly shew that it did. In *Powell v. Monnier* (a) Lord *Hardwicke* decided, that much less than this amounted to an acceptance. There, the drawee kept the bill in his possession for ten days, and, on the last of those days, merely answered the letter of advice sent by the drawer, *that the bill should be duly honoured*; and his Lordship thought that it amounted to an acceptance. But the strong case on this point is that of *Wynne v. Raikes* (b), where the question was, whether a promise contained in a letter, to accept or pay an existing bill, amounted to an acceptance? and it was held, that

(a) 1 Atk. 611.

(b) 5 East, 514.

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it did. I at first felt some difficulty from the case of *Rees v. Warwick* (a), but there the only expression used by the drawee was, "your bill shall have attention," which did not amount to an acceptance *per se*, and was properly held not to be so. But when, as in *Wynne v. Raikes*, a man undertakes to accept or pay a bill, it is far more unequivocal than saying "your bill shall have attention," which, as Lord Chief Justice Abbott observed (b), "is at least an ambiguous phrase: it may mean, that the drawee would examine and inquire into the state of the accounts between him and the drawers, for the purpose of ascertaining whether he would accept the bill or not;" but his Lordship also said, "I have no desire to break in on the authority of the two cases which have been cited," which were those I have just mentioned of *Powell v. Monnier*, and *Wynne v. Raikes*. If what passed between the defendant *Herring* and *Mornay*, on the present occasion, did not amount to an acceptance, it was nothing less than a fraud. The arrangement was made with the full consent of the defendant *Herring*, obtained through *Mornay*, the agent, who employed *Exter* to draw the bill; and it would be most unjust to say, that the defendants could now reject his agency, merely because it might suit their purpose so to do. But, it has been contended, that a promise to accept is not available, unless made to a person being a party to the bill; but, considering the relative situations of *Mornay* and *Exter* to each other, and to the defendants, we must consider that the promise was in effect made to one of the parties to the bill; for it was made to *Mornay*, who was the principal of *Exter*, the drawer of the bill: and the defendant *Herring* admitted to *Mornay*, that he had received 11,000*l.*, for the express purpose of taking up the bills. We ought not, therefore, to allow the defendants, who have, by their own admission, had this sum paid them for a particular

(a) 2 Barn. & Ald. 113.

(b) 1d. 115.

object, to elude the performance of that object, by refusing to pay the bill in question, the amount of which they had previously received.

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Mr. Justice BURROUGH.—The argument of my Brother *Wilde* might have great weight, if this case rested merely on a promise by one of the defendants; but the promise to pay the bill, coupled with an acknowledgment, that he had had money for that purpose, amounts to an acceptance; which, whether it be express or implied, tends to operate, not only to the advantage of every one whose name was on the bill at the time, but also of the subsequent holders. The action, however, is not brought upon the promise, but upon the bill; and the only question is, whether there were an acceptance or not? On reference to the principle, that a promise to pay a bill previously drawn, amounts to an acceptance, there can be no difficulty in deciding that there was an acceptance in this case; and, if so, there can be no necessity to revert to decisions, for the promise to pay was made in the strongest possible terms, one of the defendants having admitted that they had funds in their hands for the purpose of meeting the bill in question, together with others drawn upon them. They knew, from *Murray*, that the bill was drawn, and they also knew the party by whom it was drawn; their assent to the acceptance was also fortified by the bill being left at their house; if they had not meant to accept, why did they not refuse to do so? But their not having refused, is a strong ground to presume that they knew they were under a legal obligation to pay.

Mr. Justice GASELKE.—This case has been so fully gone into, that it is unnecessary for me to say more, than that I concur with my Lord Chief Justice and the rest of the Court. I am clearly of opinion that there was an acceptance of the bill in question. But it has been contended, that even if there were an acceptance, it was waived by the protest

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for non-acceptance; but as the bill was protested in consequence of the default of the defendants in not properly accepting it, they cannot now take advantage of such protest. They were bound to accept or pay the bill, after the conversation which took place between the defendant *Herring*, and *Mornay*. As to the second point, there seems to me to be no ground for saying that the instrument in question is a promissory note; and, as there has been an acceptance of the bill, it is quite unnecessary to consider whether the plaintiffs are entitled to recover on the count for money had and received; if it were, I also should desire further time for consideration. The plaintiffs therefore are entitled to judgment, and the verdict found for them at the trial must stand.

Tuesday,
June 13th.

SHAW v. RUSSELL.

The Court will not allow inconsistent pleas to be pleaded together, unless, at the time of the application for leave to plead several matters, an affidavit be made, that such pleas are necessary for the justice of the case.

THIS was an action of debt on an arbitration bond.

Mr. Serjeant *Adams* having, on a former day, obtained a rule *nisi*, to plead several matters, *viz.*—*First*, that there was no such award as that set out in the declaration;—*secondly*, that there was no bond of arbitration duly executed between the parties;—*thirdly*, performance of the award by the defendant by the delivery of a certain machine to the plaintiff, within the time limited by the arbitrator for that purpose:—and *fourthly*, performance of the award within the period stated by the arbitrator:

Mr. Serjeant *Vaughan* now shewed cause, and submitted that these pleas were inconsistent; inasmuch as the two former went wholly to deny the award, and the authority under which the arbitrator acted; and the two latter, to establish the award by asserting performance of it.

Lord Chief Justice BEST.—One of these pleas must

certainly be struck out; it is putting the plaintiff to a most unnecessary expense to bring up a witness to prove the execution of the arbitration bond, when, by the two last pleas, such bond is fully admitted; as the defendant has pleaded performance of the award, which was made under and by virtue of the bond. This practice of pleading inconsistent pleas is most abominable; and it is time that it should be put a stop to. We will therefore require, that, in future, pleas, which, on the face of them, are inconsistent with each other, shall not be filed, unless, at the time the rule for pleading several matters is applied for, an affidavit is made, showing that such pleas are necessary to further the justice of the case.

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The rest of the Court concurring—

Rule absolute, on the defendant's consenting that the second plea should be struck out.

EDGELL v. DALLIMORE.

MR. Serjeant Taddy, on a former day in this Term, had obtained a rule nisi, that an attachment might be issued against the defendant, for non-payment of a sum of money under an award.

Where an arbitrator has found that the defendant owes the plaintiff a certain sum, but did not order any time or mode of payment; the Court refused to proceed summarily against the defendant, by granting an attachment.

Mr. Serjeant Wille, now shewed cause.—On the award being produced and read by the Secondary, it appeared that the arbitrator had only found that the defendant was indebted to the plaintiff in the sum of 200*l.* on the first count of the declaration; and of 82*l.* 10*s.* on the other counts; and he directed that each party should pay his costs of the reference, and of the award. The learned Serjeant, contended, that although the arbitrator had found that the defendant was indebted to the plaintiff, still that there was

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no order for the defendant to pay, nor any mode or time pointed out, at which payment was to be made; and, therefore, that an attachment could not issue against the defendant.

Mr. Serjeant *Taddy*, in support of his rule.—The arbitrator has found that the defendant is indebted to the plaintiff in a certain sum. That is quite sufficient; and a demand by the plaintiff was all that was requisite to make the debt complete. The statement, that the defendant is indebted to the plaintiff, *ex vi termini*, includes an order for payment by him. In an action of *assumpsit*, or debt, for goods sold and delivered, there is no absolute promise to pay, but the law implies a promise, from the party's accepting the goods. Awards are frequently made, in which there is no specific direction as to the time or mode of payment.

Lord Chief Justice BEST.—It only appears, on the face of this award, that the defendant is indebted to the plaintiff in two certain sums, but there is no order as to the payment, or the time when it was to be made. The plaintiff has an immediate remedy by an action for non-payment of the sums stated by the award to be due to him from the defendant. But we cannot say that the defendant is in contempt. An attachment being in the nature of a criminal proceeding, the Court ought not to resort to it, unless the grounds for so doing are perfectly clear: and here the defendant has not disobeyed any order of the arbitrator, as to the non-payment of the sums in question, for no order has been made; we therefore cannot proceed summarily in such a case.

Mr. Justice PARK.—The plaintiff's only remedy is by an action. There is no contempt of Court, as the arbitrator has not ordered the payment of the sums in question, he has merely found that a debt is due from the defendant to the plaintiff.

Mr. Justice BURROUGH, and Mr. Justice GASELEE, concurring—

Rule discharged.

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WILSON v. POWIS.

Tuesday,
June 13th.

THIS was an action of special *assumpsit*. The *first* count of the declaration stated, that, in consideration that the plaintiff, at the request of the defendant, had delivered a certain watch to him, to be cleaned and repaired by him, the defendant, as a watch-maker, for certain reasonable reward, to be paid by the plaintiff to the defendant in that behalf, the defendant undertook to clean and repair, and take due care of the watch, and return it to the plaintiff within a reasonable time, on payment of the said reward.

Breach—that the defendant, not regarding, &c. did not take due care of the watch, but, on the contrary thereof, did not return the same to the plaintiff. The *second* count stated, that, in consideration that the plaintiff had delivered a certain other watch to the defendant, at his like request, to be rectified by him, the defendant, for certain reward, to be paid to him by the plaintiff in that behalf, the defendant undertook to endeavour to rectify, and to re-deliver the watch to the plaintiff within a reasonable time. *Breach*—that although the defendant had received the said watch, and a reasonable time for the rectifying and re-delivering of the same had elapsed, he had not re-delivered it to the plaintiff. The defendant pleaded the general issue.

At the trial, before Mr. Justice Gaselee, at Westminster, at the Sittings after the last Term, it appeared, that the plaintiff had bought the watch in question of the defendant, who was a watchmaker; that the plaintiff, some time after-

A declaration in *assumpsit* stated, that, in consideration that the plaintiff had delivered a watch to the defendant, to be repaired for certain reward, he undertook to repair and re-deliver it to the plaintiff.

Breach—non-delivery. *Proof*, that the defendant having repaired the watch, tendered it to the plaintiff, who desired him to deliver it to his uncle U., who would pay him for it; but, that the defendant, by mistake, delivered it to another uncle, from whom it was stolen:—*Held*, that the plaintiff was entitled to recover the value of the watch, and that there was no substantial variance between the declaration and the evidence; although it was objected, that the action should have

been founded on a new contract to deliver the watch to the plaintiff's uncle.

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wards, had sent it to the defendant to be cleaned and repaired; that the defendant, having repaired it, had taken it back to the plaintiff, and asked for payment; that the plaintiff had requested him to take the watch to his uncle *Uriah*, in *Margaret Street*, who would pay for the repairs; that the defendant, not being able to find the uncle in *Margaret Street*, and acting under an error as to where he had removed, had delivered the watch to another uncle of the plaintiff, residing in *Golden Lane*, who had taken it and paid for the repairs; that the house of the latter had been shortly afterwards broken open, and the watch, with other property, stolen.

The Jury found a verdict for the plaintiff, for the value of the watch.

Mr. Serjeant *Wilde*, on a former day in this Term, obtained a rule *nisi*, that the verdict might be set aside, and a nonsuit entered, on the ground of a variance between the contract declared on, and that proved at the trial, as the breach in the declaration was for not returning the watch to the plaintiff; and it was proved that when the watch, after having been repaired, was tendered to him, he refused to accept it, but requested the defendant to take it to his uncle. The declaration, therefore, ought to have been founded on the new contract, to deliver the watch to the uncle, the original contract, to return it to the plaintiff, having been discharged by the defendant's tender of the watch to the plaintiff, and his refusal to accept it.

Mr. Serjeant *Vaughan* was now about to shew cause, when the Court intimated, that the best course would be, to enter a *stet processus*, on payment of the value of the watch by the defendant, as he had delivered it to the plaintiff's wrong uncle by mistake.

This proposal, however, not being acceded to, the learned Serjeant submitted, that there was no pretence

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to set aside the verdict found for the plaintiff, as there was no variance between the contract as laid in the declaration and that proved at the trial. The contract was, for the defendant to repair a watch, and re-deliver it to the plaintiff; who, when the watch was tendered to him, requested it might be delivered to his uncle; and he must be taken to be the plaintiff's agent for this purpose. This, therefore, was no departure from the original terms of the contract, as, in law, the principal and the agent are considered as one and the same person, and a delivery to an agent is equivalent to a delivery to the principal. In *Smith v. M'Clure (a)*, Lord *Ellenborough* held, that a bill of exchange payable to a man's own order, was payable to himself, if he did not order it to be paid to any other. So, in this case, the watch was to be re-delivered to the plaintiff, if he did not make any order for its delivery to another; but he did make such an order, namely, that it should be taken to his uncle, in *Margaret Street*, who therefore stood in the place of the plaintiff, as he was authorized to receive the watch. But the defendant did not deliver the watch to the plaintiff's uncle in *Margaret Street*, but to another uncle in *Golden Lane*, who had no authority to receive it, and in whose possession it was at the time of the loss.

The Court here called on—

Mr. Serjeant *Wilde*, in support of his rule.—The contract which the plaintiff has declared on, was, that in consideration of his having delivered a watch to the defendant to be repaired, he undertook to repair and return it to the plaintiff, on being paid for repairing it. The contract proved was, that, when the defendant had repaired the watch, he took it to the plaintiff, who requested him to take it to his un-

(a) 5 East, 477.

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cle; the contract to deliver the watch to the plaintiff was therefore discharged, and the action should have been brought against the defendant, for not delivering the watch to the person to whom he ought to have delivered it, *viz.* the plaintiff's uncle. But the watch, at the time of its loss, was not in the custody of that uncle, but of another uncle of the plaintiff, to whom the defendant had delivered it, in mistake of the plaintiff's order. The question then is, not whether a contract ever existed, but whether the defendant has, under the circumstances, been guilty of a breach of the contract, as laid in the declaration.

Lord Chief Justice BEST.—There can be no doubt but that the plaintiff is, by law, entitled to recover. Still, I cannot but think, that the true justice of the case would have been better answered, if the parties had agreed to the terms proposed by the Court. The rule with regard to variance has gone to an alarming length; and by allowing technical objections to avail, they frequently tend to work injustice. The *second* count states, that the defendant, in consideration of certain reward, to be paid him by the plaintiff, undertook to endeavour to rectify the watch, and to re-deliver it to the plaintiff within a reasonable time. The meaning is clear, namely, that the defendant would re-deliver the watch, when repaired, to the plaintiff or to his agent, for a re-delivery to an authorized agent is a re-delivery to the principal. It has been said, however, that the original contract had been discharged by the plaintiff, and a new one substituted in its stead: but it was, in effect, one and the same contract. The defendant was to re-deliver the watch to the plaintiff's uncle in *Margaret Street*; and if he had delivered it to him, the plaintiff's right of action would have been answered on the merits; but it appears that, by some mistake, the watch was delivered to another uncle of the plaintiff, who resided in another part of the town, and in whose custody it remained

until it was lost. There was, therefore, no delivery, either to the plaintiff, as the principal, or to his agent: and the defendant is consequently liable for the loss.

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The rest of the Court concurring—

Rule discharged.

FLETCHER v. GILLESPIE and Others.

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THIS was an action of *assumpsit* on a charter-party. The declaration stated, that, on the 18th *March*, 1825. at *London*, by a certain charter-party of affreightment, made between the plaintiff, therein described as the owner of the ship *Berwick*, then lying in the port of *London*, and the defendants, therein described as of *London*, merchants, it was mutually agreed between the plaintiff and defendants, that the said ship, being tight, &c., and every way fitted for the voyage, should with all convenient speed sail and proceed to *Quebec*, or so near thereunto as she might safely get, and there load from the factor of the defendants, a full and complete cargo of deals, together with deal-ends and staves for broken stowage only (*the cargo to be sent alongside the ship at the expense of the merchants* (the defendants), the captain rendering the usual and customary assistance with his boats and crew), not exceeding what she could reasonably stow and carry, over and above her tackle, &c.; and being so loaded, should therewith proceed to *London*, or so near thereunto as she might safely get, and deliver the same on being paid certain specified freight for the deals, deal-ends, and staves, with 5*l. per cent* on the amount of freight, in lieu of all

By a charter-party it was agreed, that a cargo of timber was to be sent alongside the vessel at the expense of the freighters, the captain rendering the customary assistance with his boats and crew. Part of the cargo lying at a distance from the wharf, the captain applied to the freighters' factor for labourers to bring it to the ship's side; he refused, saying, *he would abide by the charter-party*. The captain procured labourers for the purpose:—*Held*, that the expenses so incurred by him, might, notwithstanding the charter-party, be recovered, under the common counts for work and labour, and money paid.

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port charges and pilotage (the act of God &c. excepted); the freight to be paid on unloading and right delivery of the cargo, one half in cash and the remainder by approved bills at four months' date. The plaintiff, after alleging mutual promises, averred that the ship, being tight, &c., did, with all convenient speed, proceed to *Quebec*, where the master was ready and willing to receive, and defendants, to wit, on the 1st *June*, 1825, did receive from the factors of the defendants a full and complete cargo of deals and staves, according to the terms of the charter-party; that, being so loaded, she proceeded to *London*, and there delivered the cargo of deals and staves to the plaintiff, according to the terms of the charter-party. *Breach*—Non-payment of freight by the defendants according to the terms of the charter-party. To this count were added counts for work and labour, and the common money counts.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last Term, it was proved, that, upon the vessel's arriving at *Quebec* for the purpose of loading her cargo, part of it lay about twenty or thirty yards from the edge of the wharf, and that the captain applied to the factor of the merchants (defendants), to have it removed to the ship's side; that the factor refused to do so, saying, *he would abide by the charter-party*; that, thereupon, the captain employed labourers to assist the crew in getting it to the side of the wharf, to whom he paid the sum of 5*l.* 14*s.*; and this sum, together with 9*l.* for wharfage dues, and also the demand for freight, the plaintiff, as owner of the vessel, sought to recover in the present action.

For the defendants, it was insisted, that, as the only breach in the declaration was for non-payment of freight, the plaintiff could not recover the above claims for the employment of labourers and wharfage dues; for, that as charges of this nature had been provided for by the charter-party, as *the cargo was to be sent alongside the ship at the expense of the merchants*, the plaintiff could not resort to the general

and implied liability of the defendants, under the counts for work and labour or money paid, but that he should have claimed under the charter-party, and declared specially thereon, assigning, as a breach, the non-payment of the sums expended by the captain in getting the cargo alongside the ship, and for the wharfage dues.

His Lordship left it to the Jury to say, whether, according to the true construction of the charter-party, the owner of the ship was entitled to be paid for the assistance of the workmen employed by the captain for the above mentioned purpose; the defendants having stipulated to bring the cargo alongside the ship at their own expense; and their factor having refused to do so.

The Jury found a verdict for the plaintiff, but leave was reserved to the defendants to move to set it aside, in case the Court should be of opinion that the plaintiff was not entitled to recover.

Mr. Serjeant *Wilde*, on a former day in 'this Term, accordingly obtained a rule *nisi*, that the verdict might be set aside and a nonsuit entered, and renewed the objection taken at the trial.

Mr. Serjeant *Vaughan* and Mr. Serjeant *Bosanquet* now shewed cause.—It was clearly the duty of the defendants to send the cargo alongside the ship at their own expense; and upon the refusal of their factor, the captain, having employed labourers to do so, had acted for the benefit of all parties; if the cargo had not been brought alongside the ship in consequence of the refusal of the factor, the plaintiff's only remedy would have been for a breach of the charter-party: but even if, as was contended at the trial, the plaintiff might have recovered the sum so expended under the charter-party, still he had a concurrent remedy on the implied promise of the factor, who had specifically stated, *that he would*

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abide by the charter-party, which was equivalent to his saying, that, if the defendants ought to pay, they would do so. This was a promise *dehors* the charter-party; and for which the plaintiff had a new remedy, independently of that instrument; for, in *White v. Parkin* (a), where the plaintiffs, having contracted, by a charter-party sealed, to let a ship, then in the *Thames*, to freight to the defendants for eight months, *to commence from the day of her sailing from Gravesend*, on the voyage there stated, and having covenanted that she should sail from the *Thames to any British port in the English Channel*, there to load such goods as the freighters should tender, and sail to the *West Indies*, and bring back a return cargo to *London*;—afterwards agreed by parol with the defendants, that the ship, instead of loading at some port in the *Channel*, should load in the *Thames*, and that the freight should *commence from her entry outward at the Custom-house*: it was held, that this subsequent parol contract was distinct from, and not inconsistent with, the contract by deed, being anterior to it in point of time and execution, and might therefore be enforced by action of *assumpsit*. At all events, the plaintiff was entitled to recover on the counts for work and labour, or money paid, as he had made out a clear *prima facie* case, and the defendants' agent had undertaken in terms to pay according to the provisions of the charter-party, by which the cargo was to be sent alongside the ship at the expense of the defendants.

Mr. Serjeant *Wilde* was heard in support of his rule.

Mr. Justice PARK.—The plaintiff's claim does not rest on the charter-party; the sum in question was paid by the captain *dehors* the contract, for the ease and benefit of the defendants; and they have reaped the advantage of it.

(a) 12 East, 578.

By the terms of the charter-party, the cargo was to be sent alongside the ship at the defendant's expense; the *captain rendering the usual assistance with his boats and crew*. If, therefore, nothing had been said independently of the charter-party, its construction might be doubtful; but the defendants' factor said, he would abide by the charter-party; that must be taken to mean that he would do all that was required to be done by his principals under that instrument, and that they would repay the captain for the labourers' services in getting the timber alongside the vessel, in case the defendants should be deemed liable to make such payment; and this undertaking being fairly within the scope of his authority, and binding on the defendants, I am of opinion that the verdict must stand.

Mr. Justice BURROUGH.—By the verdict, the Jury have, in effect, found an express promise by the factor, as the authorized agent of the defendants, to abide by the terms of the charter-party; but I am of opinion that the plaintiff might have recovered on the count for work and labour, the labour having been necessary and beneficial for the defendants.

Mr. Justice GASELEE.—It was properly left to the Jury to say, whether the expense of removing the timber was to fall on the defendants; they found that it was: there was a good consideration for their agent's promise, of which the plaintiff has a right to avail himself, either on the count for work and labour, or for money paid.

Rule discharged.

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Wednesday,
June 14th.

In a declaration of *assumpsit* by executors, in a count for money paid to and for the use of the defendant by their testator, *B. B.*, it was alleged, that "the defendant being indebted, he the said *B. B.* promised to pay the said *B. B.*:"—*Held*, that the words "the said *B. B.*" before "promised," might be considered as surplusage.

BUXTON and Others, Executors of BUXTON, v. NANCOLAS.

THIS was an action of *assumpsit*, by the plaintiffs, as executors of *Benjamin Buxton*, deceased.

The *first* count of the declaration was for 1,200*l.*, lent by the testator to the defendant.

The *second* count stated, that the defendant afterwards, and in the life-time of the said *Benjamin* (the testator), to wit, on &c., at &c., aforesaid, was indebted to the said *Benjamin*, in the further sum of 1,200*l.* for money by the said *Benjamin*, before that time, paid, laid out, and expended, to and for the use of the said defendant; and being so indebted, *he the said Benjamin*, in consideration thereof, afterwards, and in the life-time of the said *Benjamin*, to wit, on &c., at &c., aforesaid, undertook and faithfully *promised the said Benjamin* to pay, &c.

The three following counts were for money had and received, for interest, and upon an account stated between the defendant and the testator, in the life-time of the latter, and a promise to pay him accordingly.

The defendant demurred specially to the second count, and assigned for cause, that it was stated and alleged in and by that count, that *the said Benjamin*, in his life-time undertook and faithfully *promised the said Benjamin* to pay him the said sum of money in that count mentioned, when the defendant should be thereunto requested. The plaintiffs joined in demurrer.

Mr. Serjeant *Onslow*, in support of the demurrer, contended, that the count in question was altogether absurd and unintelligible upon the face of it, inasmuch as it contained no promise by the defendant to pay, but a promise by the testator to pay himself.

Mr. Serjeant *Spankie*, *contra*, referred to *Viner's*

Abridgment (a), where it is stated, that, "where a matter set forth is grammatically right, but absurd in the sense, and unintelligible, the Court cannot reject some words to make sense of the rest; but that, where a matter is nonsense, by being *contradictory* and *repugnant* to somewhat precedent, there the precedent matter, which is sense, shall not be defeated by the repugnancy which follows; but that which is contradictory shall be rejected: as, in ejectment, where the declaration is of a demise on the 2nd of *January*, and that the defendant, *postea*, *scilicet* the 1st of *January*, ejected the plaintiff; here the *scilicet* may be rejected as being expressly contrary to the *postea* and the precedent matter. *Per Holt, C. J.*, in *Wyat v. Aland* (b)." And here, the words "the said *Benjamin*," after that of "indebted," may be struck out, being superfluous and unnecessary.

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The Court being of opinion that the count was sufficient without those words:—

Judgment for the plaintiff.

(a) Tit. Nonsense, A. pl. 3.

(b) 1 Salk 324.

SCALES v. JACOB.

Wednesday,
 June 14th.

THIS was an action of *assumpsit* for butcher's meat sold and delivered. The defendant pleaded—*First*, the general issue;—and *secondly*, *actio non accrevit infra sex annos*. The plaintiff replied a promise by the defendant within six years; on which issue was joined.

In *assumpsit* for goods sold, to a plea of the statute of limitations, on which issue was joined, the plaintiff proved, that, three years after the original

cause of action accrued, and within six years of the commencement of the suit, the defendant, on being asked for payment, said, that he could not pay then, but that he would do so as soon as he was able:—*Held*, by Lord Chief Justice Best and Mr. Justice Gaselee, (*diss.* Mr. Justice Park, and Mr. Justice Burroughs,) that this was a conditional promise only, and that it did not take the case out of the statute, unless the plaintiff was prepared to prove the defendant's ability to pay.

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At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings in the last Term, it appeared by the evidence of the plaintiff's son, that the plaintiff was a butcher; that the meat had been delivered by him to the defendant, in the years 1817 and 1818, for which a bill had been sent in; that a balance remained due from the defendant to the plaintiff, of 16*l.* 2*s.* 3*d.*; that, in 1822, the witness called on the defendant, and demanded payment of the balance; and that the defendant said, it was not in his power to pay then, but that he would pay *as soon as he was able*. His Lordship was of opinion, that this was a mere conditional promise, and did not take the case out of the statute; and that, to have been available to the plaintiff, he should have declared upon it specially; and have been prepared to prove the defendant's ability to pay subsequently to his acknowledgment; and his Lordship told the Jury, that although a mere acknowledgment might raise the inference of a promise, yet that there must be a promise, either express or implied; and that, if any thing were said by the defendant to negative that inference, there must be that which either directly or indirectly amounts to a promise: and he directed a nonsuit, reserving to the plaintiff leave to set it aside, and that a verdict might be entered for him to the amount of his demand, or that a new trial might be granted.

Mr. Serjeant *Vaughan*, in the last Term, accordingly obtained a rule *nisi*, and cited the cases of *Bicknell v. Keppel* (a); *Kinder v. Paris* (b); *Leaper v. Tatton* (c); and *Thompson v. Osborne* (d); the latter of which, the learned Serjeant contended, was precisely in point, as there, a promise by a defendant to pay a debt by instalments, when *he was able*, was held by Lord *Ellenborough*

(a) 1 New Rep. 20.

(b) 2 H. Bl. 561.

(c) 6 East, 420.

(d) 2 Stark. Rep. 98.

to be sufficient to take the case out of the statute, without proof of time having been given, or of the ability of the party to pay.

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Mr. Serjeant *Adams*, on a former day in this Term, shewed cause.—The words used by the defendant, on being applied to for the balance due to the plaintiff, clearly amounted to a conditional promise only, for he said, “it is not in my power to pay now; but I will pay *as soon as I am able*.” If these words had been spoken six years after the original debt had been contracted, there can be no doubt but that this case would have fallen within the principle of *Cole v. Saxby* (a), where Lord *Kenyon* held, that if a plaintiff to a plea of infancy replies a new promise after full age, and the evidence is of a promise to pay “when the party is able,” the plaintiff must prove that the defendant was of ability to pay. The same point was raised in *Davies v. Smith* (b), where, to a demand of a debt above six years’ standing, the defendant, on being applied to for payment, said, “I think I am bound in honour to pay *Davies*, (the plaintiff), and I shall pay him *when I am able*.” Lord *Kenyon* ruled, that this was a conditional promise only, and that the plaintiff was bound to shew that the defendant was, at the time of bringing the action, of sufficient ability to pay, and added, that it had been so ruled before by Lord Chief Justice *Eyre*. So, in *Besford v. Saunders* (c), it was held, that if a bankrupt, after obtaining his certificate, promise to pay a prior debt *when he is able*; in a general *indebitatus assumpsit* brought on that promise, the plaintiff must prove the ability of the defendant to pay. In *Hyleing v. Hastings* (d), which was an action of *assumpsit* for goods sold and delivered, the defendant denied

(a) 3 Esp. Rep. 159.

Raym. 339; 1 Salk. 29; 5 Mod.

(b) 4 Esp. Rep. 36.

425; Carth. 470; 12 Mod. 223; Ld.

(c) 2 H. Bl. 116.

Holt, 427.

(d) Com. Rep. 54; S. C. 1 Ld.

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that he had bought the goods, but said, "prove it, and I will pay you;" and it was held, that proof of the debt was necessary to take the case out of the statute. Here, if the words had been spoken after the expiration of the six years from the time the debt accrued, it would, upon the authority of those cases, have been necessary for the plaintiff to prove the defendant's ability to pay at the time the action was brought. But it may be said, that, as the words were spoken by the defendant within six years from the delivery of the meat, they would operate to keep the original debt alive; and that, when they were spoken, there was no acknowledgment of the debt, or new promise necessary. The statute 21 Jac. 1, c. 16, was passed; not for the purpose of enforcing the payment of debts, but, as the preamble says, "for quieting of men's estates, and avoiding of suits in law;" and the enactment is positive (a), viz. "that all actions upon the case (other than for slander) shall be commenced and sued within six years next after the cause of such action or suit, and not after." The Courts have, from time to time, extended the strict letter of the statute, and gone far beyond the intention of the Legislature; yet, in the late case of *Hurst v. Parker* (b), where, to an action of trespass, for breaking and entering coal-mines and taking away coals, the defendant pleaded, *actio non accrevit infra sex annos*; to which the plaintiff replied, that the action had accrued within six years; and at the trial no evidence was given to shew that the trespass was actually committed within six years; it was held, that evidence of a promise to make compensation, made by the defendant before the commencement of the action, and when he was threatened with an action for taking away coals, was not sufficient to support the issue; by which the plaintiff was bound to prove the affirmative, viz. that he had a good cause of

(a) Section 3.

(b) 1 Barn. & Ald. 92.

action within six years before the commencement of the suit. It is true, that that was an action of trespass: and although *Heyling v. Hastings*, and *Leaper v. Tatton* (a), were cited to shew, that a promise to pay created a fresh cause of action; and Lord *Ellenborough*, in the latter case, said (b): “As to the sufficiency of the evidence of the promise, it was an acknowledgment by the defendant that he had not paid the bill, and that he could not pay it; and as the limitation of the statute is only a presumptive payment, if his own acknowledgment, that he has not paid, be shewn, it does away the statute:”—yet, in this case, the words spoken by the defendant were immaterial during the six years, as no new promise to pay was then necessary; and even if they are to have effect after the expiration of the six years, they must be taken only as a bare acknowledgment of a debt, and not to create any new liability, but only to furnish evidence of the delivery of the goods; and that acknowledgment must be taken subject to its terms, and is only evidence from which a promise to pay, when of ability, may be inferred; and if other words, forming a condition, are attached to this negative promise, it throws the *onus* on the plaintiff, of shewing the means of the performance of the condition, according to the case of *Heyling v. Hastings*, as reported in *Carthew*, where Lord Chief Justice *Holt* observed (c)—“That the point in law was, whether the conditional promise made upon the denial of the debt demanded, should revive the debt, now the condition of the promise was performed, *viz.* by proof of the debt, so as to bring it out of the statute of limitations.” In the report of that case in *Sal-keld* (d), the second point, as to the necessity of the proof of the debt, is altogether omitted. The great difficulty on this point has arisen from the case of *Bryan v. Horse-*

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(a) 16 East, 420.

(b) *Ib.* 422.

(c) Page 471.

(d) Vol. 1, page 29.

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man (a), where it was decided, that an acknowledgment of a debt, although accompanied with a declaration by the defendant, 'that he did not consider himself as owing the plaintiff a farthing, it being more than six years since the defendant contracted,' was sufficient to take the case out of the statute. But that case cannot now be supported, as it went far beyond the terms or meaning of the statute. In *Yea v. Fouraker* (b), the defendant, who had been surety in a promissory note for another person, upon a demand within six years, said—"You know I had not any of the money myself, but I am willing to pay half of it;" this was held sufficient to take the case out of the statute; and, according to the report in *Burrow* (c), it was a sufficient acknowledgment for that purpose, though made after the action had been commenced; but whether it be considered as a distinct promise, or merely as evidence of a promise, it was a clear and complete recognition of the original transaction, unaccompanied by any restriction or condition as to the time or mode of payment; for, on the contrary, the defendant expressed his readiness to pay half the money. But the question, as to the question whether he paid by him, or his ability to pay, was not discussed; and the Jury returned a verdict for the defendant; and the Court granted a new trial generally. But, even considering this to have been an acknowledgment of the debt by the defendant, it is only evidence from which a promise to pay may be inferred, and must be confined to the time during which the debt is acknowledged to be due, viz. the period between such acknowledgment and the original consideration. In *Trueman v. Foston*, Lord Mansfield indeed observed (d): "What was said in the argument relative to the reviving a promise at law, as to take it out of the statute of limitations, is very true. The slightest acknowledgments

(a) 4 East, 599.

(c) 2 Burr. 1099.

(b) Bull. Ni. Pri. 7th Edit by
Bridgman, 149.

(d) Cowp. 548. . . .

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ledgment has been held sufficient; as saying, 'prove your debt, and I will pay you;'—'I am ready to account, but nothing is due to you.' and much slighter acknowledgments than these will take a debt out of the statute:"—yet, his Lordship does not go the length of saying, that these expressions are to be deemed as unconditional promises; nor does it appear whether he considered the acknowledgment as setting up the old promise, or merely as evidence of a new one: if only the latter, the promise in this case must be taken subject to its qualification, viz. to pay when the defendant might be able to do so. In *Hellings v. Shaw* (a), which was an action of *assumpsit*, by an attorney, to recover his charges relative to the grant of an annuity, evidence was given that the defendant said, he thought it had been settled when the annuity was granted; but that he had been in so much trouble since, he did not recollect any thing about it; and this was held not to be a sufficient acknowledgment of the debt, so as to take it out of the statute; and was not to be left to the Jury as evidence of the admission of such debt, although the plaintiff proved that his bill was not paid at the time of granting the annuity;—and Lord Chief Justice Gibbs said: "It is difficult to reconcile all the cases which have been determined on this point. It is probable, that, if the Courts could retract the steps which they have taken, they would perceive that justice would have been better consulted by a strict adherence to the statute, without consulting the particular cases of individuals." The rule to be collected from all the late decisions is, that an acknowledgment of a debt can only be considered as evidence from which a promise may be inferred, but that it does not necessarily imply a promise. In *A'Court v. Cross* (b), which was an action of *assumpsit* for money lent, the defendant plead-

(a) 1 B. Moore, 340; S. C. 7 Taunt. 608.

(b) *Ante*, page 198; S. C. 3 Bing. 329.

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ed *actio non accrevit infra sex annos*; and, on being arrested, he said to the sheriff's officer, "I know I owe the money, but the bill I gave is on a three-penny stamp; and now I am arrested I will never pay:" it was held, that this was not such an acknowledgment of the debt as would take the case out of the statute. And Lord Chief Justice *Best* said (a): "The Courts have held, that a bare *acknowledgment* of a debt within six years, is sufficient to take a case out of the statute, although unaccompanied by any *promise to pay*. That appears to me to be against the spirit and letter of the act. If, however, a particular construction has been put upon a statute, which has been followed by a long and uniform series of decisions, it ought not to be departed from. But, where there are conflicting authorities, or where the principles on which those authorities are founded appear doubtful, we ought to go back to the fountain-head, and take the statute itself for our guide. If I were now sitting in a Court of Error, I think I should say, that any acknowledgment of a debt, although made in distinct and unqualified terms, would not deprive the party making it of the protection of the statute."—The authority of *Bryan v. Horseman* has been much doubted in several subsequent cases. A man may acknowledge the existence of a debt, which he knows himself to be incapable of paying; and it is contrary to sense and reason to presume, from such acknowledgment, that he promises to pay it. Yet, without regarding the circumstances under which an acknowledgment might have been made, the Courts, on proof of it, have frequently inferred a promise. But there are several cases from which it may be collected, that if there be any thing said at the time the acknowledgment is made, which can repel the inference of a promise, a bare acknowledgment will not take a case out of the statute. In *Dickson v. Thomson* (b), it was ruled

(a) *Ante*, 204.

(b) 2 Show. 125.

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by Lord Chief Justice *Scroggs*, and agreed to by counsel, that a *promise* of payment within the six years, though the debt were contracted long before, would evade the statute; but that *confession*, or only *acknowledgment* that the defendant owed the plaintiff so much, would not do it:—and, in *Bland v. Haselrig*, Lord Chief Justice *Pollexfen* was of opinion (a), that if the promise were renewed within the six years, yet, if not upon a new consideration, it should not bind:—the reporter adds a *quære*, “for the common practice is, upon a plea of the statute of limitations, to prove only a renewing the promise, without any further consideration; but a *bare owning the debt is not taken to be sufficient*.” Here, therefore, although the words were spoken by the defendant during the six years, they can have no other effect than if they had been spoken after that period; and if they are to be considered as an acknowledgment, they can only be deemed evidence from whence a promise to pay may be inferred; and that promise must be taken with all the circumstances and conditions annexed to it, *viz.* to pay as soon as the defendant was able to do so.

Mr. Serjeant *Vaughan*, in support of his rule.—The acknowledgment by the defendant was, at all events, a conditional promise to pay the debt, when he should be able; and, admitting it to be only conditional; yet, in fact, it was altogether unnecessary that any promise should have been made: as the law will imply a promise from the bare acknowledgment of the debt. Besides, the acknowledgment was made within six years from the time the original debt was contracted. The principal question raised by the issue is, whether the plaintiff's cause of action had accrued within the six years. In cases where the original cause of action has expired by the effluxion of that period, a new promise has been held to

(a) 2 Vent. 152.

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revive it, or to constitute a new cause of action. Although, in *Dean v. Crane* (a), which was an action of *assumpsit* by an executor, on a promise to the testator, and the defendant pleaded the statute, it was held, that a promise to the executor within six years could not be given in evidence; yet that was merely a question of variance; but here, no express or absolute promise was necessary; for if the defendant had acknowledged that he had had the meat, but had said he would not pay, and never would do so, could it be contended that he might shelter himself behind that statement, to avoid the payment of a just debt, which he had admitted to be due? In *Mountsteele v. Brooke* (b), where, in a deed between the defendants and a third person, the defendants acknowledged, within six years, the existence of a debt, and the plaintiffs were wholly strangers to the deed: it was held, that this was sufficient to take the case out of the statute; on the ground, that the legal effect of an acknowledgment of the existence of a debt within six years, is sufficient of itself to raise a promise to pay the debt.

[Lord Chief Justice Best.—In *Stann. v. Sowell* (c), in *assumpsit* on a promissory note, the defendant pleaded—*First*, the general issue; and *secondly*, the statute of limitations; but there was no plea or notice of set off; and it was proved, that, on the plaintiff's showing the defendant the note within six years, he said—“you owe me a great deal more money, and I have a set off against it; and it was held by Mr. Justice Bayley and Mr. Justice Holroyd, that this was not a sufficient acknowledgment within six years, to take the case out of the statute; yet I thought differently.]

In *Thompson v. Osborne* (d), the promise to pay was clearly conditional, for the defendant promised to pay a debt by instalments; and Lord Ellenborough held, that it was sufficient to take the case out of the statute, as it was

(a) 1 Salk. Rep. 28.

(b) 3 Barn & Ald. 141.

(c) 2 Barn. & Ald. 759.

(d) 2 Stark. Rep. 98.

an acknowledgment which created a debt. In *Hurst v. Parker* (a), his Lordship drew a distinction between *assumpsit* and *trespass*: holding that a promise cannot be revived in an action of *tort*; but that, in *assumpsit*, the acknowledgment of a debt is evidence of a fresh promise. Although, in *Pittam v. Foster* (b), where an action was brought against A. and B., and C. his wife, upon a joint promissory note, made by A., and C. before her marriage, and the promise was laid by A. and C. before her marriage, and the defendants pleaded the statute, whereupon issue was joined: it was held, that an acknowledgment of the note by A., within six years, but after the intermarriage of B. and C., was not evidence to support the issue; yet, Lord Chief Justice Abbott said, "the question is, whether an acknowledgment made within six years operates as a new substantive promise, or draws down the original promise to the time when the acknowledgment is made; in *Hurst v. Parker*, Lord Ellenborough says, that, in actions of *assumpsit*, an acknowledgment of the debt is evidence of a fresh promise. If that be not so, but, on the contrary, the acknowledgment be to have the effect of drawing down the original promise, then, in an action by an executor upon promises made to the testator, evidence of a promise made to the executor would support the issue. But the reverse of this proposition was decided in *Green v. Crane* (c)." But here, there was no fresh promise necessary, as the original cause of action was still subsisting. The law creates a liability, and infers a promise to pay, upon the bare acknowledgment of the existence of the original debt. In *Frost v. Bengough* (d), where, to an action on a promissory note, the defendant pleaded the statute, and the plaintiff gave in evidence a letter, written by the defendant to him, stating that 'bu-

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(a) 1 Barn. & Ald. 92.

(d) 8 B. Moore, 180; S. C. 1

(b) 1 Barn. & Cress. 248.

Bing. 266.

(c) 2 Lord Raym. 1101.

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business called him to *Liverpool*, but should he be fortunate in his adventures, the plaintiff might depend on seeing him at *Bristol*, (the place of the plaintiff's residence), otherwise, that he must arrange matters with him as circumstances would permit; and it was not shewn that the letter referred to any other transaction between the parties, it was held, that it was properly left to the Jury to determine whether it related to the note, so as to amount to a sufficient acknowledgment to take the case out of the statute; and they having found in the affirmative, it was held that the verdict was conclusive. So here, the acknowledgment of the debt by the defendant was sufficient to shew that a cause of action existed to the plaintiff, and the more especially so, as the acknowledgment was made within the six years, in which the plaintiff's original cause of action accrued: and in *Leaper v. Tatton* (a), where the defendant acknowledged his acceptance of a bill, and said that he had been liable, but that he was not liable then, because it was out of date, and that he could not pay it; it was not in his power to pay it; this was held sufficient to take the case out of the statute. And Mr. Justice Bayley said: "It was certainly good evidence upon an account stated; it was evidence of a debt;—acknowledging his acceptance, and that he has not paid it, creates a debt." //

Cur. adv. vult.

The Court being divided in opinion, delivered their judgments *seriatim* as follows:—

Mr. Justice GASELEE.—This was an action of *assumpsit*, for meat sold and delivered. The defendant pleaded the general issue, and that the plaintiff's cause of action did not accrue within six years; to which the plaintiff replied a promise by the defendant to pay within six years, on which issue was joined. At the trial, before my Lord

(a) 16 East, 420.

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Chief Justice, the plaintiff proved, that the defendant, on being applied to for payment, about three years after the cause of action accrued, and within six years of the commencement of the action, said, that it was not in his power to pay then, but that he would pay as soon as he was able. His Lordship nonsuited the plaintiff, on the ground that this was only a conditional and not an absolute promise to pay. A rule *nisi* to set aside this nonsuit was granted, and cause has been shewn against it. I am of opinion, that the nonsuit was proper, and therefore that the rule for setting it aside should be discharged. It is unnecessary to go into any supposed difference or distinction between a promise and an acknowledgment. It has now been held, that a bare acknowledgment of a debt, *quasi* an acknowledgment, is sufficient to revive the debt; it is only evidence from which a new promise may be implied: but there must be a new promise. The first case upon the subject is that of *Heyling v. Hastings* (a); and the Court there considered the acknowledgment as evidence only of a new promise. The words of the statute are, "that all actions upon the case (other than for slander), shall be commenced and sued within six years next after the cause of such actions, and *not after*."

With regard to every species of action except that of *assumpsit*, it has been held, that the plaintiff must shew that he commenced his action within the time prescribed by the statute, and that the defendant is not bound to plead that the six years have expired. It is difficult to assign a reason for this difference in the action of *assumpsit*, and, probably, if the question had now for the first time arisen, the Court would be disposed to extend the rule to that species of action also; but it is now too late to disturb a doctrine that has so long obtained; for, as was said by Mr. Serjeant *Williams*, in a note

(a) 1 Ld. Raym. 389; S. C. Carth. Hutt. 427; Com. Rep. 54.
470; 1 Salk. 29; 12 Mod. 223;

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to *Hodden v. Horridge* (a), "it is now settled, that if the defendant would take advantage of this statute, it is necessary for him to plead it, although the cause of action appears on the declaration to have accrued upwards of six years before; and he will not be permitted to give it in evidence on the general issue."

The main question then is—Whether, what was said by the defendant in this case, was or was not a new promise. In *Heyling v. Hastings*, indeed, the Court held, that a new promise might operate as a revival of an old one, although not made to the plaintiff; and that a count in a declaration for goods sold by the testator, was proved by a promise to pay made to the executor more than six years after the original cause of action had accrued. Yet, shortly after this decision, viz. in the case of *Dean v. Crane* (b), (which was decided in the third year of Queen Anne, *Heyling v. Hastings* having been determined in the reign of William 3rd), where a note had been made by the defendant to the plaintiff's testator above six years before the action brought, for payment of money; upon a plea of *non assumpsit infra sex annos*, at the trial, before Lord Chief Justice Holt, the plaintiff gave evidence of a promise made to him by the defendant, after his arrest, and before the bill exhibited. The question was—Whether the evidence maintained the declaration; and the case of *Heyling v. Hastings* was referred to, for the purpose of shewing that a promise after the six years brought the matter out of the statute; but that a mere acknowledgment of owing the debt does not go so far, but that it is evidence of a promise. The reporter, in a note to that case, states that the declaration was on a promise made to the testator, and the promise given in evidence was to the executor; and that the Court said, that the executor might declare on a promise to himself:—yet the case was adjourned; and afterwards, upon conference with *all the Judges*, it was held, that the evidence did not maintain

(a) 2 Wms. Saund. 63, n. 6.

(b) 6 Mod. 309.

the declaration. So, in *Hickman v. Walter* (a), where the statute of limitations was pleaded to an action brought by an executor on a promise made to his testator, and the plaintiff replied a subsequent promise to himself, it was held to be a departure in pleading, and therefore bad: and Lord Chief Justice *Willes* said, "We are of opinion that the replication is not good, for the time of limitation must be computed from the time when the action first accrued to the testator, and not from the time of proving the will. The proving of the will gave no new cause of action, and therefore the time of proving the will is perfectly immaterial. But there is another reason also not mentioned by the counsel; because all the promises in the declaration are laid to be made to the testator; and where they are so, it was held in the case of *Green v. Cook* (b), reported by the name of *Dean v. Crane* (c), that an executor cannot give evidence of a promise to himself within six years." This case, therefore, confirms that of *Dean v. Crane*; and the point seems to have been admitted in the case of *The Executors of the Duke of Marlborough v. Widmore* (d), where the plaintiffs declared as executors on a promise to their testator; and issue was joined on a plea of the statute of limitations; and the plaintiffs moved to amend, by laying the promise to have been made to themselves, were allowed to do so, on payment of costs, and liberty to the defendant to plead *de novo*. In *Savell v. Wine* (e), it was also held, that evidence of an acknowledgment by the defendant, within six years, of an old existing debt of above six years standing, due to the plaintiff's intestate, but which acknowledgment was made after the intestate's death, would not support a count by the administrator, laying the promise to be made to his intestate;

(a) *Willes*, 27.

(d) 2 Str. 890.

(b) 3 Ann. B. R.

(e) 3 East, 409.

(c) 1 Salk. 28; S. C. 6 Mod. 309.

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and Lord *Ellenborough* there said, that the case of *Green* (or *Dean*) v. *Crane*, was decisive in support of the objection. In *Kinder v. Paris* (a), which was an action by the assignees of an insolvent debtor, to recover money owing by the defendant to the debtor, before his insolvency, and the plaintiffs declared, that, in consideration of the money being due to the insolvent, the defendant promised to pay it to the plaintiffs as assignees; it was held to be a bad plea; that the cause of action first accrued to the insolvent before the plaintiffs became assignees, and that six years had elapsed after the cause of action first accrued to the insolvent, and before the suing out the writ of the plaintiffs. And Mr. Justice *Buller* seemed to think, that the plaintiffs must prove an *express promise* to themselves at the trial. The case of *Pittam v. Foster* (b), turned upon the same point. There, an action was brought against *Foster*, and *Norris* and his wife, upon a joint promissory-note, made by *Foster* and *Norris's* wife, before her marriage, and the promise was laid by *Foster* and *Norris's* wife, before marriage, and issue was joined upon a plea of *actio non accrevit infra sex annos*; proof was given of an acknowledgment of the debt, by *Foster*, within the six years: and Lord Chief Justice *Abbott* said: "This question depends upon the form of the promise laid in the declaration; that is not immaterial, because a promise made by the wife after marriage would not be available. Then the question is—whether an acknowledgment made within six years operates as a new substantive promise, or draws down the original promise to the time when the acknowledgment is made. In *Hurst v. Parker* (c), Lord *Ellenborough* says, that, in actions of *assumpsit*, an acknowledgment of the debt is evidence of a fresh promise. If that be not so, but, on the contrary, the acknowledgment is to have the

(a) 2 H. Bl. 561.

(b) 1 Barn. & Crés. 248.

(c) 1 Barn. & Ald. 93.

effect of drawing down the original promise; then, in an action by an executor upon promises made to the testator, evidence of a promise made to the executor would support the issue. But the reverse of this proposition was decided in *Green v. Crane* (a). That was an action of *assumpsit* by an executor, upon promises to the testator. The defendant pleaded *non assumpsit infra sex annos*, and, upon evidence, it appeared, that, after the death of the testator, and after six years from the time of the contract, the defendant acknowledged the debt to the executor, and promised to pay it. Lord Chief Justice *Holt* delivered the resolution of the Court, and said, that they were all of opinion, that the action could not be maintained, the promise being made to the executor, and so out of the issue. That case was followed by several others of the same kind, which it is unnecessary to mention. The last was in the Court of *Common Pleas*, *Ward v. Hunter* (b). That was an action by an executrix, on promises made to the testator—Plea, statute of limitations. Plaintiff relied upon defendant's having said to her, that the testator always promised not to distress him for the money. The plaintiff having obtained a verdict, a motion was made to enter a nonsuit; and the Court said, when the Courts determined, that an acknowledgment is evidence of a new promise then made, it must be of a promise made by a person competent to make it, and to a person who is in existence to receive it; and the rule for a nonsuit was made absolute. That case was determined at a time when Lord Chief Justice *Gibbs* presided in the *Common Pleas*; than whom no Judge was ever more perfectly acquainted with the rules of pleading." In *Pittam v. Foster*, the other Judges were of the same opinion with the Lord Chief Justice; and it was therefore decided, that the acknowledgment of the defend-

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(a) 2 Ld. Raym. 1101.

(b) 6 Taunt. 210.

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ant. Foster, made within six years, but after the marriage of Norris, was not evidence to support the issue.

It is unnecessary to cite more decisions, for the purpose of shewing that a promise, made under the circumstances of the present case, is a new promise, and not a revival of an old one; and, therefore, that it must be correctly declared on, according to the fact, for the same reason that a promise made to an executor will not support a declaration alleging a promise made to his testator.

It may be said indeed, that the cases, to which I have referred, do not exactly apply to the present in point of fact, but they are the same in principle; which is, that if a creditor does not seek to recover upon an original promise, but upon a new one, he must take care to state such new promise truly and accurately in his declaration. A promise by a debtor to pay, when he shall be able, certainly differs materially from a promise to pay when requested; nor will evidence of the former promise support a declaration founded upon the latter. In other words, a conditional promise to pay when of ability, cannot be given in evidence under a declaration framed on a general promise to pay. In *Cole v. Sanby* (a), where, to a plea of infancy, the plaintiff replied a new promise after full age, and the evidence was of a promise to pay when the party was able; Lord Kenyon said: "This is not an absolute promise to pay, it is, 'when he is able.' I remember a case before Lord Mansfield, in *Staffordshire*, in which he was of opinion, that it was incumbent on the plaintiff to shew that the defendant was of ability to pay at the time of the action brought." In *Davies v. Smith* (b), where the defendant, upon being applied to for payment of a debt above six years standing, said: "I think I am bound in honour to pay the money, and shall pay him (the plaintiff) when I am able."

(a) 3 Esp. Rep. 159.

(b) 14 Esp. 36.

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Lord Kenyon again ruled, that it was a conditional promise only; and that the plaintiff was bound to shew that the defendant was then of sufficient ability to pay; adding, that it had been so ruled before by Lord Chief Justice Eyre. So, in *Beesford v. Saunders* (a), where a bankrupt, after obtaining his certificate, promised to pay a prior debt when he was able; in a general *indebitatus assumpsit*, brought on that promise, it was held, that the plaintiff must prove the ability of the defendant to pay.

There are other *Nisi Prius* cases, subsequent to those of *Cole v. Sanby*, and *Davies v. Smith*. In *Thomson v. Orborne* (b), which was an action of *assumpsit* by a seaman to recover wages; and the defendant pleaded the statute; the plaintiff relied in the first instance on a letter written by the defendant, in which he stated that the question concerning the right to wages, under the circumstances of the case, was then pending in the House of Lords; and, that if that case should be decided against the defendant, all the wages due would be paid; and a copy of the judgment for the plaintiff in the case before the House of Lords was produced; it was objected for the defendant, that the special counts alleged an absolute contract, and not a conditional one, such as was proved in evidence; and, to take the case out of the statute, it was proved, that a previous application had been made to the defendant, for payment, and that the defendant had then stated that he was in embarrassed circumstances, but that if time were given, he would pay the debt by instalments; and Lord Ellenborough was of opinion, that a promise to pay the debt by instalments was sufficient to take the case out of the statute. The case of *Lewth v. Fothergill* (c), was somewhat similar. There, when a demand was made by a seaman on the owner of a ship for wages, which had ac-

(a) 2 H. Bl. 116.

(b) 2 Stark. Rep. 98.

(c) 4 Camp. 185.

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crued during an embargo, he said, "if others paid, he should do the same:" and it was contended for the defendant, that this was no promise to take the case out of the statute; and that it was, at any rate, incumbent on the plaintiff to shew that others had paid. But Lord *Ellenborough* said: "I think this amounts to an acknowledgment, on which the law implies a promise. The defendant did not say that he had paid the wages; but, on the contrary, he admitted that they were unpaid. He only expressed doubts on the law of the question, which has been finally decided against him." So, in *Gregory v. Parker* (a), which was an action against a husband for goods supplied to his wife for her accommodation, while he occasionally visited her, his Lordship held, that a letter written by the wife, acknowledging the debt within six years, was admissible evidence to take the case out of the statute. But in *A'Court v. Cross*, Lord Chief Justice *Best* said (b): "Although the Courts have held, that a bare *acknowledgment* of a debt within six years is sufficient to take a case out of the statute, although unaccompanied by any promise to pay, that appears to me to be against the spirit and letter of the act." With that opinion I fully concur; and I think that what was said by the defendant in this case, amounts to a conditional promise only, and should have been declared upon as such.

But it has been said, that there is a wide distinction between a promise made before the expiration of the six years from the time the cause of action originally accrued, and a promise made after the six years had elapsed: I confess I do not think that this distinction is well founded. It has been said also, that if, at the time when the new promise is made, the statute has not attached, the

(a) 1 Camp. 394.

(b) *Ante*, 204.

party has no right to add fresh terms to the original contract; and that he is not bound by such promise during the six years; for that, if within that time, the plaintiff should commence his action, he would bring it upon the original contract, and not rely upon the subsequent promise. This position is undoubtedly correct; but here the six years had expired before the action was brought; the cause of action was therefore gone, unless it were revived. Although the defendant, by a new promise, might have prolonged the duration of his liability beyond the six years, yet, if the plaintiff would avail himself of such new promise, he must declare upon it in the terms in which it was made. Although it was formerly said, that it was unfair and dishonest in a defendant to take advantage of this statute, yet, this is not now the case, for all the Courts have lately been of opinion, that this is a highly useful and beneficial statute.

I shall conclude in the words of Mr. Serjeant *Williams*, in his elaborate note to the case of *Hodsden v. Harridge*. "After all, it might perhaps have been as well, if the letter of the statute had been strictly adhered to; it is an extremely beneficial law, on which, as it has been observed, the security of all men depends, and is therefore to be favoured. *Green v. Revitt* (a). And although it will now and then prevent a man from recovering an honest debt, yet it is his own fault that he postponed his action so long; besides which, the permitting of evidence of promises and acknowledgments within the six years, seems to be a dangerous inlet to perjury."

Mr. Justice BURROUGH.—I hope, that when a case of sufficient importance arises upon this branch of the statute, at *Nisi Prius*, it may be turned into a special case. But it appears to me, that the facts in this case remove

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(a) 2 Salk. 421-2.

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all doubt. They are shortly these: In 1818, the plaintiff, a butcher, sold meat to the defendant; in 1822, or 1823, in a conversation between the plaintiff's son and the defendant, the latter acknowledged that he was indebted to the plaintiff in the sum of 16*l.* 2*s.* 3*d.*; but said, that he could not pay it then, but that he would do so as soon as he was able. This was about four years after the original debt was contracted; that debt, therefore, was still alive; and the action was commenced within six years from the time of such acknowledgment, although more than that period had elapsed from the time the goods were supplied; and yet this is said to be a conditional promise to pay. Suppose, that, the day after this promise had been made, the plaintiff had brought his action on an account stated, there can be no doubt, but that this acknowledgment would have been sufficient to have proved the existence of the debt; and an action founded upon such acknowledgment would, in my opinion, have been maintainable to the end of the six years after such acknowledgment. The defendant could not have pleaded *actio non accrevit infra sex annos*, as the action, in fact, accrued at the time the promise was made, and continued from that time to the expiration of the six years after the acknowledgment. Nor can I consider this at all in the nature of a conditional acknowledgment: "I will pay you when I am able," although it may be a *conditional promise*, still it is a *clear acknowledgment* that a debt is due; and, from such an acknowledgment, the law will imply a promise. But, at the time of the acknowledgment, the plaintiff's original claim being still alive, there was no necessity for any acknowledgment, although, from it, a new and lawful cause of action arose to the plaintiff. But, on the issue of *actio non accrevit infra sex annos*, I think the action might have been maintained, although there was no direct promise to pay, but only an acknowledgment of a pre-existing debt.

Where an acknowledgment of a debt is made within the six years, it is very different from an acknowledgment made after the expiration of that period; as the former keeps the debt alive: and, in this case, the promise or acknowledgment was made during the existence of the original demand or cause of action, and therefore the condition annexed was of no effect. In *Heyling v. Hastings* (a), Lord Chief Justice *Holt* said, "There is a difference, where the six years are expired before the making of such conditional promise, and where they are not; because the contract, not being barred by the statute, has no need of so much assistance to continue it, as it must have to revive it, if it had been once absolutely destroyed." This appears to me to be a very material and important observation; for here the original contract remained in the same state as it did before the acknowledgment was made by the defendant; and whether the plaintiff brought his action on the original contract, or upon an account stated, he was not barred by the statute of limitations, as the acknowledgment had been made within six years from the time of the delivery of the goods.

There is a wide distinction between this case, and that of *Cole v. Sarby* (b); for, there, infancy was a good bar to the action until the contrary was shewn: the original contract was a nullity, the defendant being an infant at the time it was made; but the promise, after he became of age, was a new obligation, and consequently was to be taken with its new condition; and therefore the proof of a mere conditional promise falsified the replication, which alleged a new promise in general terms. In *Davies v. Smith* (c), the new promise was made more than six years after the original contract; and, being conditional, it undoubtedly ought to have been treated as such: there seems, there-

(a) 1 Ld. Raym. 389. (b) 3 Esp. Rep. 159. (c) 4 Esp. Rep. 36.

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fore, to be a solid and well-founded distinction between an acknowledgment or promise made before the expiration of the six years, and an acknowledgment made afterwards. Here, there does not, in fact, seem to be any necessity for a promise at all; as a promise is implied and created from an acknowledgment of the existence of the debt, and its remaining unpaid; and a bare acknowledgment is sufficient to keep an existing debt alive: for, in an action of debt to recover the price of goods sold, a promise may be implied from an acknowledgment, the debt being available to the plaintiff at the time such acknowledgment was made.

On these grounds, I am of opinion, that the plaintiff is entitled to a verdict.

Mr. Justice PARK.—It has been truly observed, that the conflicting decisions to be found in our reports, upon this branch of the statute of limitations, reflect no particular credit upon *Westminster Hall*; and I am very glad that the Courts of law seem inclined, as far as possible, to retrace their steps, and to get back to the plain construction of the statute. Having that view myself, I was happy to concur with the other Judges of this Court, in the last *Michaelmas* Term, in the case of *A Court v. Cross*(a), in endeavouring to assist in so desirable an object. In what I am now about to say very shortly upon the case at bar, I do not consider myself as trenching, at least, I am sure I do not mean to trench, upon that decision. Indeed, in delivering my opinion here against the defendant, I do not trouble myself with any of the conflicting cases, which have heretofore been decided; for this case depends upon its own peculiar circumstances, and particularly on the time when the promise was made. If, however, contrary

(a) *Ante*, p. 198.

to my intention, another case is added to the number of inconsistencies which already crowd our books upon this subject, it will render the duty more imperious, whenever a case of sufficient value occurs, to have all these matters put upon record, that we may have one rule of sound judgment from the highest tribunal, upon this frequently recurring subject.

The facts of this case may be given in a few words: To an action for butcher's meat sold, there is a plea of the general issue, and also of the statute of limitations. The meat was delivered in 1817 and 1818; and, if nothing more could be stated, the statute of limitations had clearly run upon the demand; but, within two or three years, certainly within six years, from the delivery of the meat, the defendant, on being applied to for payment, said, *it was not in his power to pay for it then; but, as soon as it was, he would.* Here is a promise; but I admit, it is a *conditional* one; and I admit also, that, if the statute had run, that is, if six years had expired before that promise (being a conditional one) was made, the debt only would have been recoverable on proof of the defendant's ability to pay, upon the authority of the case of *Davies v. Smith* (a). But here the promise to pay was made *before* the statute had run, at a time when the defendant had no right, as I think, to annex any condition; at least, the condition, so annexed, could be of no avail during the six years; for it is evident that, notwithstanding the defendant might choose to clog his promise with a condition, the plaintiff might have sued him at any time within six years; and, *without going into the original consideration of the goods sold and delivered*, he might have recovered upon proof of this conditional promise. This, I am sure, is every day's practice at *Nisi Prius*, in undefended

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(a) 4 Esp. 36.

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causes, where proof is given of the defendant having said, "I wish to pay, and I will, if I am ever able," or other expressions of the like nature; and yet the plaintiff recovers without proof of the defendant's ability. For illustration—suppose a man has given a promissory note, payable in two months, and has not paid it at the end of this time; but, in about a year, pays interest, which is indorsed upon the note by consent of both parties; I will suppose that the same proceeding takes place in the second, third, fourth, and fifth years: I take it for granted, it will be conceded to me, that an action brought at any time *within six years from the last indorsement*, though perhaps ten years after the date of the original note, would not be barred. This is also exactly the case of mutual accounts between parties, where every new item and credit in the account, given by the one party to the other, is an admission of there being some unsettled account between them, the amount of which is to be afterwards ascertained; and any act, which the Jury may consider as an acknowledgment of its being an open account, is sufficient to take it out of the statute: and in *Cranch v. Kirkman* (a), the exception in the statute, as to merchant's accounts, was held not to be strictly confined to persons of that description.

But the case I have hitherto put, as to the indorsement on a note, I admit has been upon a mere payment of interest, without any condition annexed. It does not seem to me, however, that if in *each year*, when those payments were respectively made, there were added to the indorsement, the words, 'Next year I will pay principal and interest, *if I am able*,' any difference in law would exist between the cases. There is the promise to pay what by law the defendant was at that time bound to pay; and as the con-

(a) Peake, N. P. C. 121, 3rd Edit. 164.

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dition as to his ability would not prevent the immediate enforcement of the demand within the six years, it ought not to affect a clear acknowledgment of the debt, with a *promise tacked* to it, although clogged with a condition, which, at the time it was added, the party had no right to impose. Therefore, the presumption raised by the statute, from lapse of time, is here rebutted by a promise to pay before the six years had expired; and though there was a condition annexed, it is a clear recognition that the debt was not satisfied or paid, when the conditional promise was made. The nearest case to the present, which I have found, is that of *Thompson v. Osborne* (a), where Lord *Ellenborough* held—That a promise by a defendant to pay a *debt by instalments, if time were given him*, took the case out of the statute, and this even after the statute had run. I will not trouble the Court with quoting other cases; for, having looked at many, I thought it would have been an idle parade, and a great waste of time, to run through a bead-roll, when not one of them has the distinguishing feature of the present case, upon which I rely; namely, a *promise*, though burdened with a condition, within that period when the promise might avail the plaintiff, though the condition might work him no injury, nor delay his immediate remedy. I wish it to be understood fully, that I strongly rely upon a *promise* accompanying the acknowledgment. I am not arrogant or presumptuous enough, especially as my brother *Gaselee* has already expressed his opinion to be in favour of the defendant, and I am also to be encountered by that of my Lord Chief Justice, to suppose that I am right; but, under my present conscientious, and not hasty impression, I think this nonsuit ought to be set aside: however, as the Court are equally divided, of course it cannot be disturbed.

(a) 2 Stark. Rep. 98.

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Lord Chief Justice BAST.—After the elaborate judgment pronounced by my brother *Gaselee*, it will be unnecessary for me to say much more than that I entirely concur with him; I shall not therefore trouble the Court by going through all the cases upon the subject.

The two best statutes in our books are the statute of frauds and the statute of limitations; but it has unfortunately happened, that various Judges have taken a very different view of the policy of those statutes from that which was apparently intended by the Legislature at the time they were passed; and, until lately, there has been a struggle in *Westminster Hall* to get rid altogether of the beneficial effect of those statutes. In delivering my present opinion, I shall endeavour, as much as possible, to act as the Legislature seemingly intended.

If we trace the progress of opinion upon this subject, we shall find that the earliest cases were in strict conformity to the statute. In *Dickson v. Thompson* (a), Lord Chief Justice Scruggs, with the assent of all the bar, ruled, that a promise of payment within the six years, though the debt were contracted long before, would evade the statute; but that confession, or only acknowledgment, that the defendant owed the plaintiff so much, would not do it. In *Bass v. Smith* (b), Lord Chief Justice Hale so ruled, on the ground that the acknowledgment of the debt was no more than was done by the plea; but that there must be a new promise of the debt within six years, to make the action hold. In *Lacon v. Briggs*, Lord Hardwicke said (c)—“There must be a direct admission of a debt, to take it out of the statute; though there have been several cases at law, where this has not been held sufficient, unless it is likewise attended with an express

(a) 2 Show. 125.

T. (b) 63, Vol. 12, p. 229.

(b) Viner's Abridg. tit. Evidence,

(c) 3 Atk. 107;

~~promise to pay~~; but that may be rather too hard." The case of *Hayling v. Hastings*, which is reported in so many different books, is one of great authority, as it was decided by all the Judges but one, after much consultation; and that decision ought to have due weight with us in the present case. It was there held (a), that an acknowledgment of a debt within six years would not amount to a new promise to bring it out of the statute; but that it was only evidence of a promise.

After this, equity lawyers came into our common law Courts: Lord *Mansfield* and Lord *Loughborough* brought with them equitable notions of the statute of limitations; and they adopted these notions as a rule of law, instead of relying upon the words of the statute. In *Trueman v. Fenton* Lord *Mansfield* said (b)—“The slightest acknowledgment has been held sufficient to take the case out of the statute, as saying, ‘*prove your debt, and I will pay you,*’—‘*I am ready to account, but nothing is due to you:*’ and much slighter acknowledgments than these will take a debt out of the statute;” and in *Yea v. Fouraker* (c), his Lordship, with the concurrence of the rest of the Court, decided, without argument, that an acknowledgment of the debt, even after the commencement of the action, took it out of the statute. Lord *Loughborough* entertained the same opinion, and subsequently other Judges, until at length an extraordinary decision took place in the Court of King’s Bench, viz. that, upon a refusal by the defendant to pay, a promise might be implied, that he would pay; for, in *Douthwaite v. Tibbut* (d), where, upon demand made of payment of seamen’s wages, accrued during the *Russian* Embargo, the defendant answered, ‘that *he would not pay*; there were none paid; and he did not mean to pay,

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(a) 1 *Ld. Raym.* 421.(c) 2 *Burr.* 1099.(b) *Cowp.* 548.(d) 5 *Mau. & Selw.* 75.

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unless obliged:’ this was held to be sufficient to take the case out of the statute.

The Court of *Common Pleas* first held a contrary doctrine in *Hellings v. Shaw*, where Lord Chief Justice *Gibbs* points out three cases (a) in which the defendant was not entitled to the protection of the statute. *First*—Where the defendant acknowledges a debt to have been due to the plaintiff, but that it was discharged by lapse of time. *Secondly*, where a defendant admits the existence of a debt, but claims his discharge under a written instrument, to which he with precision refers, but which does not amount to a legal discharge, he is bound by such admission, as he thereby precludes all possibility of any other payment, unless what the instrument affords. *Thirdly*, where a defendant challenges a plaintiff to a certain species of proof, *viz.* that he would satisfy the plaintiff, as he could produce his receipt, he is bound to produce such receipt. The present case does not come within the principle of either of these. All the decisions upon the subject came under the consideration of this Court, in the late case of *A’Court v. Cross*, in which my opinion received the approbation of my brother *Park*: and, after a due re-consideration of that case, I still think, that the conclusion we then came to, was fully warranted by preceding decisions. I there said (b), that “although there might be cases where a mere acknowledgment had been deemed sufficient to amount to evidence, on which a Court might presume a promise to pay, yet, if any thing were said at the time to repel the inference of a promise, it is too much to say that it would revive the debt, so as to bring the case within the operation of the statute.” I shall adhere to that opinion, until the *House of Lords* pronounce that I am wrong.

(a) 1 B. Moore, 344.

(b) *Ante*, 205.

Having disposed of the cases, I now come to the statute itself. Wherever the language of a statute is plain and intelligible, we are bound to adhere to it—and if there happen to have arisen a series of conflicting decisions upon its construction, we are the more especially bound to exercise our common sense, as to its true meaning and exposition. Without the decisions to which we have been referred, no one could read the statute of limitations, and not admit that the present action cannot be maintained. It has been said, that the object of the Legislature in passing the act, was to protect people who had lost the evidence of their payments; but, on inquiring into the history of the act, we shall find that this position is not warranted. The act itself affords evidence to the contrary; the title of it is—“An act for limitation of actions, and for *avoiding of suits in law*.” The preamble is—“For quieting of men’s estates, and *avoiding of suits*.” In ejectment, after twenty years have expired, the cause of action cannot be revived by any subsequent acknowledgment of the party. The words of the third section are, “That all actions of trespass, &c., (naming various actions), *shall be commenced* and sued within the time and limitation thereafter expressed, *and not after*; that is to say, actions upon the case (other than for slander), within six years next after *the cause* of such actions or suit, *and not after*.” The meaning is clear, that after six years had expired from the period when a complete cause of action accrued, the plaintiff should not be able to bring his action: but it has been held, that a new cause of action may be created after the six years, by an acknowledgment of a previously existing debt; as, from such acknowledgment the law will imply a promise to pay. This appears to me to be against the very principle of the statute; and how this latitude came to be extended to actions of *assumpsit*, it might be difficult to de-

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termine, as, by no contrivance can it be made to extend to any other species of action mentioned in the statute; and yet the principle of the act is exactly the same with regard to those actions, as to that of *assumpsit*. Mr. Justice *Bayley* has designated this as a statute of peace,—it was passed for the purpose of quieting claims, and not merely to protect parties against the consequence of loss of evidence. It is most unjust, after a party has slept six years over his rights, to sue a man, whom time and difficulties may have pressed down, and disabled from discharging his obligations; it is oppressive and anti-christian to call upon him, after the creditor's own neglect may have incapacitated his debtor from meeting his demand. Therefore, there must be a distinct and substantive cause of action within six years; which, in this case, there is not: it is true, that within six years after the time the original debt was created, the defendant said that he would *pay when he was able*: this certainly was only a conditional promise, and the plaintiff, in his action, should have averred, and been prepared to prove, that the defendant was in a condition to pay subsequently to the promise, or at the time of action brought. For my own part, I can see no difference whether a promise has been made within the six years, or after that period: one thing, however, is quite clear, *namely*, that within the six years the defendant might have been sued on the original cause of action, without any reference to the subsequent promise: but, after the six years had expired, the original cause of action was gone for ever; and the only ground for renewing it was created by the new promise, which, in this case, was a conditional, and not a general promise; and the plaintiff should have shewn, that the condition was capable of being performed, before he could rely on such promise as a new and substantive cause of action. That such a promise creates a new cause of action, and does not bring down the old one, may be collected from *Heyling v. Hast-*

ings, and all the subsequent cases to the present time. The very form of the pleadings indicates as much—the defendant pleads that he did not promise within six years, and the plaintiff replies, that he did; this, then, is the only point in issue, and the plaintiff relies on the subsequent promise of the defendant, to shew that his cause of action did accrue within the time mentioned. The authorities are with me, and the cases of *Cole v. Saxby*, and *Davies v. Smith*, are decisive to shew that a bare acknowledgment of an existing debt, or a mere conditional promise, cannot be considered as a general or absolute promise. Although I am not disposed to give too much weight to *Nisi Prius* decisions; yet, when a series of such cases shew what the uniform practice on such occasions has been, they are entitled to our consideration. Lord *Kenyon* has twice ruled, that, if a promise is conditional, it will not take the case out of the statute, unless the plaintiff can shew that the condition has been performed. Sir *James Mansfield* and Lord Chief Justice *Eyre* have ruled the same way; and so did Mr. Justice *Heath* when I was at the bar. Four eminent Judges have therefore held, that such a promise as this would not take a case out of the statute, without proof of the ability of the defendant to perform the condition, *viz.* by shewing his capability to pay.

My brother *Gaselee* has fully gone into all the cases on the subject, but it does not appear, from the reports of those cases, whether the promise was made before or after the six years had expired; but, for the reasons I have already stated, I consider this to be immaterial; and, therefore, am of opinion, that the nonsuit ought to stand.

The Court being thus equally divided in opinion, the nonsuit was allowed to stand, and the rule for setting it aside was

Discharged.

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RULE OF COURT.

TRINITY TERM, 7 GEO. IV. 1826 (a).

WHEREAS, by statute 6 *Geo.* 4, c. 50, s. 23, a provision is made, that where a rule shall be drawn up for a view, the rule shall, if the Court or Judge granting the same think fit, require the person applying for the view to deposit in the hands of the under-sheriff a sum of money, to be named in the rule, for payment of the expenses of the view.

And whereas it is desirable that some general rule should be made upon this subject—

IT IS THEREFORE ORDERED, that, upon every application for a view, there shall be an affidavit, stating the place at which the view is to be made, and the distance thereof from the office of the under-sheriff;—that the sum to be deposited shall be 10*l.* in case of a common Jury, and 16*l.* in case of a special Jury, if such distance do not exceed five miles; and 15*l.* in case of a common Jury, and 21*l.* in case of a special Jury, if it be above five miles; and if such sum shall be more than sufficient to pay the expenses of the view, the surplus shall forthwith be returned to the attorney of the party who obtained the view: and if such sum shall not be sufficient to pay such expenses, the deficiency shall forthwith be paid by such attorney to the under-sheriff.

And it is further ordered, that the under-sheriff shall pay, and shall account for the money so deposited, according to the scale following, that is to say:—

	£	s.	d.
For travelling expenses to the under-sheriff, the			
shewers, and jurymen, each <i>per</i> mile . . .	0	1	0

(a) This rule was made by the Court of King's Bench, on a former day in this Term. See 5 Barn. & Cress. 795; 8 Dow. & Ryl. 757.

	£	s.	d.	1826.
Fee to the under-sheriff, where the distance does not exceed five miles from his office . . .	1	1	0	
Where such distance exceeds five miles . . .	2	2	0	
And in case he shall be necessarily absent more than one day, then, for each day after the first, a further fee of	1	1	0	
Fee to each of the shewers the same as to the under-sheriff, calculating the distance from their respective places of abode.				
Fee to each common juryman, <i>per diem</i> . . .	0	5	0	
Fee to each special juryman, <i>per diem</i> . . .	1	1	0	
Allowance for refreshment to the under-sheriff, the shewers, and jurymen, whether common or special, each <i>per diem</i>	0	5	0	
To the bailiff, for summoning each juryman, whose residence is not more than five miles distant from the office of the under-sheriff .	0	2	6	
And for each whose residence does exceed five miles of such distance	0	5	0	

W. D. BEST.
J. A. PARK.
J. BURROUGH.
S. GASELEE.

END OF TRINITY TERM.

AN
I N D E X
TO THE
P R I N C I P A L M A T T E R S.

ABATEMENT.

See PRACTICE, 1, 4, 5.

ACTION.

See ACTION ON THE CASE.

ASSUMPSIT.

COVENANT.

EJECTMENT.

LIBEL.

SLANDER.

TRESPASS.

TROVER.

ACKNOWLEDGMENT.

See LIMITATIONS, STATUTE OF.

ACTION ON THE CASE.

See CARRIER.

1. In an action on the case against the defendant, for maliciously lodging a detainer against the plaintiff, the declaration averred that the suit (in which the detainer was lodged) was determined by a rule of Court, by which it was ordered that the plaintiff should be discharged out of custody, and the proceedings stayed:—*Held*, that the rule was sufficient evidence to support the allegation; although it was objected, that it was obtained merely on the oath of the plaintiff, who would, by its admission, be, in effect, giving evidence in her own cause. *Brooke v. Carpenter*, Page 59

2. In an action on the case for an
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injury resulting to the plaintiff from falling down an unprotected area, the declaration stated, that the defendant was *possessed* of the premises, and that they were adjoining "a certain common and public street and highway." It appeared that the defendant had agreed with the owner of the premises (two carcasses of houses) to finish one of them, for doing which he was to have the other; and that workmen employed by him were then actually at work upon them; but it did not appear that any conveyance had been made to him. The street in question, which had been forming for six years, and led from a public street to a new road across fields, over which the way had been publicly used for five or six years, was unfinished, one half only being lighted, the other neither lighted nor paved; but the inhabitants had paid the highway and paving rates:—*Held*, that this was sufficient evidence to go to a Jury of a possession in the defendant, and of a dedication of the street to the public. *Jarvis v. Dean*, 354

ADJUSTMENT.

See INSURANCE, 2.

ADVOWSON.

1. Where a prebendary, having the advowson of a rectory in right of his

prebend, dies while the church is vacant, without having presented:—*Held*, that the right to present is in the succeeding prebendary, and does not pass to the personal representative of the deceased. *Rennal v. Bishop of Lincoln*, 139

AFFIDAVIT TO HOLD TO BAIL.

1. An affidavit of debt stated that the plaintiffs had furnished goods to the amount of 2,000*l.* to one *N.*, for whom the defendant undertook to be answerable; that *N.* had since failed, and paid a dividend of four shillings in the pound only; and that 1,600*l.* remained due to the plaintiffs:—*Held*, sufficient. *Collins v. Wallis*, 248

2. An affidavit to hold to bail, stating that the defendant is indebted "for goods sold and delivered by the plaintiff to the defendant," is sufficient, though it omit to add "at his request." *Rowley v. Bayley*, 383

3. It is sufficient if an affidavit of debt, made by one of the assignees of a bankrupt, state that the defendant is indebted, &c., as appears by the books of the bankrupt, and as the deponent verily believes; without alleging that the books are in the deponent's possession. *Hutton v. Bristow*, 504

AGENT.

See *TROVER*, 4.

AGREEMENT.

See *AMENDMENT*.

LANDLORD AND TENANT.

1. Several persons jointly agreed to establish a stage coach, each to horse it one stage. For carrying this agreement into effect, the parties bound themselves each to the other, to pay to the plaintiff, in case of default, certain penalties, for which he alone was to be empowered to sue; the amount of such penalties to be divided among all the parties to the agreement who

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should not have subjected themselves to any penalty, to the exclusion of the defaulter:—*Held*, that the plaintiff alone might maintain an action for a breach of the agreement, and that the other parties need not join. *Radenhurst v. Bates*, 421

2. In *assumpsit* for the breach of an agreement, a clause contained therein, although illegal, as being in restraint of trade, if it form no part of the consideration, need not be set out in the declaration. *M'Allen v. Churchill*, 483

AMENDMENT.

See *FINE*.

RECOVERY.

1. In *assumpsit* for the breach of an agreement, the declaration contained four counts, some of which were bad in law; and the Jury found a general verdict for the plaintiff. The evidence applied to the first count. After writ of error brought, and after argument in the Court of King's Bench, this Court ordered the *postea* to be amended, by entering the verdict for the plaintiff on the first count, and for the defendant on the others; and they also ordered the judgment-roll to be amended by the amended *postea*, after the judgment of this Court had been reversed, and entered of record in the Court of error. *Richardson v. Mellish*, 104

ANNUITY.

1. An *annuity* executed by fore the en pursuant to 141, s. 2. rolled with execution o is sufficient, then executi v. *Buckerid*

2. If the to the deed

ASSUMPSIT.

ist, it is sufficient, without specifying the parties by whom the deed was executed in their presence. *Ibid.*

APPEARANCE.

See INFANT.

APPOINTMENT.

See POWER.

APOTHECARY.

See AWARD.

ARBITRATION.

See AWARD.

ARREST.

See PRACTICE, 4, 5, 13, 17.

ASSIGNEE.

See BANKRUPT.

INSOLVENT DEBTOR.

PARTNERS.

ASSUMPSIT.

See AMENDMENT.

ERROR, WRIT OF.

FREIGHT.

LIMITATIONS, STATUTE OF.

PLEADING, 5, 11, 14, 15.

1. By bills of lading, goods were made deliverable "to C. & Co., or to assigns, he or they paying freight for the same." C. & Co. indorsed the bills to the defendants, brokers, and afterwards became bankrupt. The brokers for the ship, in ignorance of the insolvency of C. & Co., and of their having indorsed the bills to the defendants, applied to the former for payment of freight; and afterwards sued the defendants:—*Held*, that the latter were liable for the freight, on a general *indebitatus assumpsit*:—*Held* also, that a party who obtains goods under a bill of lading, impliedly contracts to pay the freight. *Dougall v. Kemble*, 250

2. Parish officers can only require from the father of a bastard child a security to indemnify the parish from

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any charge for its maintenance. A deposit of money for that purpose is contrary to the policy of the law; and such deposit may be recovered back.

Clarke v. Johnson,

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8. In *assumpsit* for the breach of an agreement, a clause contained therein, although illegal, as being in restraint of trade, if it form no part of the consideration, need not be set out in the declaration. *M'Allen v. Churchill*,

483

4. A declaration in *assumpsit* stated, that, in consideration that the plaintiff had delivered a watch to the defendant, to be repaired for certain reward, he undertook to repair and re-deliver it to the plaintiff. *Breach*—non-delivery. *Proof*, that the defendant having repaired the watch, tendered it to the plaintiff who desired him to deliver it to his uncle U., who would pay him for it; but that the defendant, by mistake, delivered it to another uncle, from whom it was stolen:—*Held*, that the plaintiff was entitled to recover the value of the watch, and that there was no substantial variance between the declaration and the evidence; although it was objected, that the action should have been founded on a new contract to deliver the watch to the plaintiff's uncle.

Wilson v. Powis,

543

5. By a charter-party it was agreed, that a cargo of timber was to be sent alongside the vessel at the expense of the freighters, the captain rendering the customary assistance with his boats and crew. Part of the cargo lying at a distance from the wharf, the captain applied to the freighters' factor for labourers to bring it to the ship's side; he refused, saying, *he would abide by the charter-party*. The captain procured labourers for the purpose:—*Held*, that the expenses so incurred by him, might, notwithstanding the charter-party, be recovered under the common counts for work and labour, and money paid. *Fletcher v. Gillespie*,

547

6. In a declaration of *assumpsit* by executors, in a count for money paid to and for the use of the defendant by their testator, *B. B.*, it was alleged, that "the defendant being indebted, he the said *B. B.* promised to pay the said *B. B.*:"—*Held*, that the words "the said *B. B.*" before "promised," might be considered as surplusage. *Buxton v. Nancolas*, 552

ATTACHMENT.

1. A motion for an attachment against a person subpoenaed as a witness, for not attending at a trial, must be made within the term succeeding the trial, and a copy of such subpoena must be delivered personally at the time of service. *Thorpe v. Gisbourne*, 55

2. Where an arbitrator only found that the defendant *was indebted* to the plaintiff in a certain sum, but did not order any time or mode of payment; the Court refused to proceed summarily against the defendant by granting an attachment. *Edgell v. Dallimore*, 541

ATTORNEY.

See VESTRY.

1. An attorney having acted for both parties in a suit, the Court ordered the proceedings to be set aside, and the attorney to pay the costs of the cause, and of the motion. *Berry v. Jenkins*, 308

2. The defendant employed the plaintiff, an attorney, to conduct a suit for his son. On the trial of that cause the attorney called the defendant as a witness, and, lest he should be objected to as incompetent, by reason of interest, he prepared a release:—*Held*, that the conduct of the plaintiff was a fraud upon the Court, and that he was not entitled to recover. *Williams v. Goodwin*, 342

3. *A.* agreed with *B.* for the sale

AWARD.

of a copyhold estate, which had previously, by mistake, been surrendered to *C.* *A.* was afterwards arrested, and discharged under the Insolvent Debtors' Act. Subsequently to *A.*'s discharge, the mistake being discovered, *C.* surrendered back the estate to *A.*, who immediately surrendered to *B.*, the purchaser; the consideration-money being paid to the defendant, the attorney of *A.*, to whom he had given a bond for 40*l.*, for money borrowed, which, together with the amount of the bill of costs due to him from *A.*, it was agreed he should retain out of the produce of the estate. The assignee of *A.* sued the defendant for the amount received by him, as money had and received to his use:—*Held*, that, although the legal estate in the copyhold was not in the insolvent at the time of his discharge, by reason of the erroneous surrender to *C.*, he had still such an equitable interest in it as would pass by the assignment:—*Held* also, that the defendant had an equitable lien on the purchase-money in his hands, for the amount of the bond given to him by the insolvent, and also for his bill of costs. *Twiss v. White*, 413

AUCTION.

1. The plaintiff put up a horse to sale at a public auction, and sent his servant to bid for him, to enhance the price. The last *bona fide* bidding was 12*l.*, and the horse was ultimately knocked down at 29*l.*:—*Held*, that the bidding by the servant was a fraud upon the purchaser, and, consequently, that the sale was void. *Crowder v. Austin*, 283

AWARD.

See ATTACHMENT.

1. An award cannot be objected to on account of any thing that does not appear on the face of it. Therefore,

BAIL-BOND.

where an arbitrator had awarded to an apothecary in *London* charges for attendances, the Court refused to refer back the award to him for re-consideration. *Gensham v. Germain*, 1

2. Where an arbitrator only found that the defendant *was indebted* to the plaintiff in a certain sum, but did not order any time or mode of payment; the Court refused to proceed summarily against the defendant, by granting an attachment. *Edgell v. Dallimore*, 541

BAIL.

1. Bail cannot justify for a defendant brought into Court *to be* charged in execution in the cause. *Bircham v. Chambers*, 343

2. The defendant having been arrested in *Middlesex*, original bail were put in there; and afterwards added bail were taken before a commissioner in the country, and put in with the filacer for *Middlesex*:—*Held* regular; the commissioner in the country having full authority to act by virtue of his commission. *Moore v. Kenrick*, 498

BAIL-BOND.

1. The defendant having been arrested by the name of *Stephen T. Silk*, signed a bail-bond in his full name, *Stephen Thomas Silk*:—The Court ordered the bail-bond to be cancelled, on the defendant's undertaking to bring no action; but observed that, in future, they would, in such cases, leave the party to his plea in abatement. *Lake v. Silk*, 57

2. The defendant was held to bail on a bill of exchange. The Court refused to order the bail-bond to be delivered up, to be cancelled, on an affidavit that the bill was founded and given on an usurious transaction. *Isaacs v. Silver*, 348

3. In debt on a bail-bond, the de-

BANKRUPT.

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claration need not contain averments that there was an affidavit of debt, or that the sum sworn to was indorsed, on the writ. *Dorrington v. Bricknell*, 445

BANKER.

See TROVER.

BANK-NOTE.

See TROVER.

1. A party taking a bank-note in payment of a bet from a stranger on a race-course, is not bound to use the same precaution as would be requisite if the note were taken by a tradesman. *Snow v. Sadler*, 506

BANKER'S CHECK.

1. To prove the payment of a check for 100*l.*, the loan of which constituted the petitioning creditor's debt, it was shewn, that the check was in the hands of the drawer; and that, on the day after the date of the check, his bankers had paid to the bankers of the bankrupt 100*l.* on his account. The petitioning creditor was one of the assignees of the bankrupt, and, in that character, had possession of all his papers:—*Held*, that, under these circumstances, the mere fact of his having this check was not evidence of its payment. *Bleasby v. Crossley*, 327

BANKRUPT.

See BILL OF LADING.

TROVER, 4.

1. A debtor to a bankrupt's estate cannot, in an action brought against him by the assignee, set up the statute of limitations as an objection to the petitioning creditor's debt. *Mavor v. Pyne*, 12

2. A livery-stable keeper, who bought horses for the purpose of

letting out, occasionally sold them, but without having a horse-dealer's licence. At the trial, the Judge expressed himself of opinion, and the defendant's counsel assented, that this was a sufficient trading within the meaning of the bankrupt act. The Court refused to disturb the verdict. *Martin v Nightingale*, 305

3. To prove the payment of a check for 100*l.*, the loan of which constituted the petitioning creditor's debt, it was shewn, that the check was in the hands of the drawer; and that, on the day after the date of the check, his bankers had paid to the bankers of the bankrupt 100*l.* on his account. The petitioning creditor was one of the assignees of the bankrupt, and, in that character, had possession of all his papers:—*Held*, that, under these circumstances, the mere fact of his having this check, was not evidence of its payment. *Bleasby v. Crossley*, 327

4. A creditor called upon the bankrupt, by appointment. The bankrupt left the room, and did not return, and his wife told the creditor that he had gone out:—*Held*, that this was sufficient evidence to warrant the Jury in inferring that the bankrupt left his house with intent to avoid a creditor. *Charrington v. Brown*, 341

5. In *assumpsit*, on a bill of exchange, the defendant pleaded in bar, his bankruptcy and certificate. The commission issued on the 29th January, and the certificate under it bore date the 5th November, 1825:—*Held*, that the certificate did not require enrolment under the 5 Geo. 4, c. 98, that statute having been repealed before the certificate was obtained; nor under the 6 Geo. 4, c. 16; the 96th section of that act, which requires the enrolment, applying only to commissions issued after the act had taken effect. *Tattle v. Grimwood*, 432

6. A promise by a bankrupt to deliver goods in satisfaction of a debt due by him before his bankruptcy, is not such a promise to pay the debt, as will revive it after certificate. *Ibid.*

BARON AND FEME.

See COPYHOLD.

BASTARD.

1. Parish officers can only require from the father of a bastard child a security to indemnify the parish from any charge for its maintenance. A deposit of money for that purpose is contrary to the policy of the law; and such deposit may be recovered back. *Clarke v. Johnson*, 319

BERWICK UPON TWEEED.

1. The town and liberties of *Berwick-upon-Tweed*, are not, for any purpose, within or part of the county of *Northumberland*. The Mayor, &c. of *Berwick-upon-Tweed v. Shanks*, 372

BILLS OF EXCHANGE.

See BANK NOTE.

PRACTICE, 18.

TROVER, 8.

1. In a declaration against the drawer, on a bill of exchange accepted payable at a banker's generally, it is only necessary to aver a presentment at that place. *De Bergareche v. Pillin*, 350

2. If a bill of exchange be drawn payable at a particular place, and a party accept it, without stating that he accepts it there, and not elsewhere, according to the terms of the statute 1 & 2 Geo. 4, c. 78, s. 1:—*Held*, that this must be taken as a general acceptance, and no averment of presentment for payment at that place is necessary. *Selby v. Eden*, 371

BILL OF LADING.

3. The defendants sent an agent to Mexico, to purchase interests in mines, and payments were made on behalf of the defendants, to carry on the transactions, which were provided for by bills drawn by a sub-agent on the defendants, and with their authority and consent. Before the bills were presented for acceptance, the defendants had transferred their interests in the mines to a Company, who would have provided for the bills, but one of the defendants requested their agent, who then acted for the Company, that funds might be placed in the defendant's hands to take up the bills, stating, that it would be unpleasant to have the bills drawn upon their firm paid by a third party; upon which it was agreed that the defendants should have the money for the purpose of paying the bills which were left at their house for acceptance, but not accepted; and when the agent complained to one of the defendants on the subject, he expressed his surprise, and said that they had had the money, and that the bills ought to be paid:—*Held*, that this amounted to a parol acceptance, and that the defendants were liable to pay the amount of the bills to an indorsee, although he had in ignorance protested the bills for non-acceptance. *Fairlie v. Herring*, 520

BILL OF LADING.

1. By bills of lading, goods were made deliverable "to C. & Co., or to assigns, he or they paying freight for the same." C. & Co. indorsed the bills to the defendants, brokers, and afterwards became bankrupt. The brokers for the ship, in ignorance of the insolvency of C. & Co., and of their having indorsed the bills to the defendants, applied to the former for payment of freight; and afterwards

CHARTER PARTY. 595

sued the defendants:—*Held*, that the latter were liable for the freight, on a general *indebitatus assumpsit*:—*Held* also, that a party who obtains goods under a bill of lading, impliedly contracts to pay the freight. *Dougall v. Kemble*, 250

CARRIER.

1. The proprietor of a stage-coach is not liable for an injury sustained by a passenger in consequence of the accidental overturning of the coach, unless such accident be occasioned by the negligence or misconduct of the driver. Therefore, where, in an action for an injury of this description, it appeared that the cause of the accident was the removal (since the coach had last passed) of one of two cottages that had previously stood on an angle of the road, by which means the driver was deceived as to the course of the road (it being night, though moonlight), and the Judge told the Jury, that, as the road was of sufficient width, and there was no obstruction or want of light, the coachman ought to have kept within its limits, and a verdict was found for the plaintiff: the Court granted a new trial, conceiving that it should have been left to the Jury to say, whether or not the driver had been guilty of negligence. *Crofts v. Waterhouse*, 133

CERTIFICATE.

See BANKRUPT, 5, 6.

CHARTER PARTY.

1. By a charter-party it was agreed, that a cargo of timber was to be sent alongside the vessel at the expense of the freighters, the captain rendering the customary assistance with his boats and crew. Part of the cargo

lying at a distance from the wharf, the captain applied to the freighters' factor for labourers to bring it to the ship's side; he refused, saying, *he would abide by the charter-party*. The captain procured labourers for the purpose:—*Held*, that the expenses so incurred by him might, notwithstanding the charter-party, be recovered, under the common counts for work and labour, and money paid. *Fletcher v. Gillespie*, 547

CHURCH.

See ADVOWSON.

COACH PROPRIETOR.

See CARRIER.

CONDITION PRECEDENT.

See INSURANCE, 2.

CONSIDERATION.

See ASSUMPSIT, 3, 4.

COVENANT.

COPYHOLD.

See INSOLVENT DEBTOR, 3.

1. A surrender of copyhold premises made by a married woman to her husband, in his presence, and with his assent, testified by his immediate admittance under it; she having been first solely and secretly examined by the steward:—*Held* valid. *Scaman v. Man*, 243

COSTS.

See ATTORNEY.

VESTRY.

1. The defendant pleaded a tender as to part, with a *proferit in curiam*, and *non assumpsit* as to the residue; and the plaintiff took the money out of Court. At the trial, the Jury found a

COVENANT.

verdict for the defendant on the plea of tender, and for the plaintiff on the general issue, damages 1*l.* 19*s.* 6*d.*:—*Held*, that the defendant could not enter a suggestion on the roll, to deprive the plaintiff of his costs, under the London Court of Requests Act, 39 & 40 Geo. 3, c. 104. *Waistell v. Atkinson*, 14

2. In *quare impedit*, a defendant is not entitled to costs on a judgment as in case of a nonsuit. *Wyndome v. Carlisle, (Bishop)*, 269

3. A plaintiff will not be allowed his expenses in the construction of a model, nor a compensation for loss of time to scientific persons, who had been sent to a distant part of the country to inspect a building there, although he could not safely have proceeded to trial without their testimony. *Bayley v. Beaumont*, 497

4. The statute 24 Geo. 2, c. 18, s. 1, whereby the Judge, by certifying that the cause was a proper one to be tried by a special Jury, may relieve the party applying for such special Jury from the expenses, does not extend to a case where the record is withdrawn. *Clements v. George*, 510

COURT OF CONSCIENCE.

See COSTS, 1.

COVENANT.

1. A covenant to restrain a person from exercising a trade is not illegal, if it be not to the general prejudice of the public, and the consideration be reasonable. *Homer v. Ashford*, 91

2. In covenant, the plaintiff in his declaration (after *proferit*) averred, that the defendants, for the considerations in the deed contained, covenanted that they would not do certain acts. The defendants pleaded, that, as the performance of the covenants in the indenture mentioned, would,

DEED.

for a term, prevent them from carrying on their trade, they were in restraint of trade, and illegal:—*Held*, that, as the defendants had not cravedoyer of the deed, nor demurred to the declaration on account of any supposed insufficiency of consideration in the deed, as set out therein, the Court would (the covenants being reasonable) presume that the deed disclosed a sufficient legal consideration. *Homer v. Ashford*, 91

3. Covenant by the assignee of the lessee of a term, is a local action; and the *venue* must be laid in the county where the lands are situate. *The Mayor &c. of Berwick-upon-Tweed v. Shanks*, 372

DAMAGES.

See INTEREST OF MONEY.

DEBT.

See GAMING.

INTEREST OF MONEY.

DEDICATION OF HIGHWAY.

See HIGHWAY.

DEED.

See COVENANT, 2.
EVIDENCE.

1. The attesting witness to a deed stated, that he knew the defendant, one of the parties; that the attestation was in his (the witness's) hand-writing; that he did not know whether or not the signature to the deed was the defendant's hand-writing, but that he would not have put his name to it unless he had seen him execute it:—*Held*, sufficient proof of the execution. *Doe d. Smythe v. Claxton*, 347

DISTRESS.

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DEVISE.

1. A testator devised lands to his wife, for life, remainder to his sons, in fee, "subject to, and charged and chargeable with, the payment of the yearly rent or sum of 20*l.* to the defendant and her assigns, during her life:—*Held*, a charge on the land, and that the defendant might distrain for arrears. *Buttery v. Robinson*, 262

DISTRESS.

See LANDLORD AND TENANT.

1. The plaintiff took possession of premises under an agreement for a lease to be granted to him for a term of ten years, at a yearly rent, payable half-yearly. No lease was executed, nor was the *quantum* of rent to be paid ascertained; but the plaintiff occupied under the agreement for three years, paying rent for two:—*Held*, that this created a tenancy from year to year, and entitled the landlord to distrain for the arrears due, at the rate previously paid. *Knight v. Bennett*, 222

2. By the custom of the country, the tenant was to have the use of the barns, gate-houses, &c., of the farm, for a certain period after the end of the term, for the purpose of threshing out corn and foddering cattle. The tenancy was determined at *Michaelmas*, and the landlord, in *January* following, distrained a corn-rick for the rent due at *Michaelmas*, he having in the mean time obtained an injunction to restrain the tenant from carrying off the premises corn in the straw:—*Held*, that the holding by the tenant under the custom, though involuntary, was a prolongation of the original term; and that the landlord was entitled to distrain. *Knight v. Bennett*, 227

3. A testator devised lands to his wife, for life, remainder to his sons,

in fee, "subject to, and charged and chargeable with, the payment of the yearly rent or sum of 20*l.* to the defendant and her assigns, during her life:—*Held*, a charge on the land, and that the defendant might distrain for arrears. *Buttery v. Robinson*, 262

DISTRINGAS.

See PRACTICE, 14.

EJECTMENT.

1. The provisional assignee of the Insolvent Debtors' Court, may maintain ejectment for the estate of an insolvent assigned to him under the provisions of the statutes 1 *Geo.* 4, c. 119, and 3 *Geo.* 4, c. 123, without the previous approbation of one of the commissioners, or order of the Insolvent Court. *Doe d. Clark v. Spencer*, 7

2. The Court refused to stay the proceedings in an action of ejectment brought on the demise of the provisional assignee of the Insolvent Debtors' Court, on the ground of the absence of proof of the consent of the major part of the creditors, and approbation of one of the commissioners, or order of the Court, as required by the statutes 1 *Geo.* 4, c. 119, s. 11, and 3 *Geo.* 4, c. 123, s. 2. *Doe d. Clark v. Spencer*, 232

3. Where, by a mortgage-deed, the principal sum was advanced by the mortgagee to the mortgagor, for three years from the date of the deed, the interest to be payable quarterly, and the deed contained a proviso, that, if default should be made in payment of interest on any of the days appointed for the same, the mortgagee might sell the premises assigned:—the mortgagor having made default in the payment of one quarter's interest, the mortgagee brought ejectment, the Court refused to stay the proceedings

EVIDENCE.

on payment of the arrears of interest, and costs, by the mortgagor, as the case did not fall within the provisions of the statute 7 *Geo.* 2, c. 20, as the principal sum became payable on default of payment of the interest. *Goodtitle d. Green v. Nottle*, 491

ERROR, WRIT OF.

See AMENDMENT.

GAMING.

1. In *assumpsit* a verdict was entered for the plaintiff on twelve counts of the declaration, and the Jury were discharged from finding any verdict on the other eight counts, the issues on which were immaterial. The Court, on error, refused to reverse the judgment, on the ground that it was not stated on the record, that the Jury were discharged with the consent of the parties. *Powell v. Sonnett*, 330

EVIDENCE.

See ACTION ON THE CASE, 2.

LIBEL.

1. In covenant, on articles of agreement under seal, the plaintiff alleged in his declaration that the deed was lost, and proved, that two parts were executed, that the part executed by him was delivered to the defendants, and that the part executed by them was delivered to him; and duly stamped, previously to the loss. At the trial, the plaintiff offered in evidence a draft or copy of the deed; but, he having given the defendants notice to produce their part, they did so:—*Held*, that, although it was the best, still it was only secondary evidence of the contents of the lost deed; and might therefore be received without a stamp. *Munn v. Godbold*, 49

2. A foreign judgment is *prima facie* evidence of a debt, and that

EXECUTORS.

every thing was done in the Court in which it was obtained, that was necessary to support it. *Arnott v Redfern*, 209

3. To prove the payment of a check for 100*l.* the loan of which constituted the petitioning creditor's debt, it was shewn, that the check was in the hands of the drawer; and that, on the day after the date of the check, his bankers had paid to the bankers of the bankrupt 100*l.* on his account. The petitioning creditor was one of the assignees of the bankrupt, and, in that character, had possession of all his papers:—*Held*, that, under these circumstances, the mere fact of his having this check, was not evidence of its payment. *Bleasby v. Crossley*, 327

4. The attesting witness to a deed stated that he knew the defendant, one of the parties; that the attestation was in his (the witness's) hand-writing; that he did not know whether or not the signature to the deed was the defendant's hand-writing; but that he would not have put his name to it unless he had seen him execute it:—*Held*, sufficient proof of the execution. *Doe & Smythe v. Claaton*, 347

5. In trespass for false imprisonment, the *onus* of justifying rests on the defendant. Therefore, in trespass for causing the plaintiff to be apprehended under a justice's warrant:—*Held*, that the plaintiff might maintain the action without producing the warrant. *Holroyd v. Doncaster*, 440

EXECUTORS.

See ADVOWSON.

1. In a declaration of *assumpsit* by executors, in a count for money paid to, and for the use of, the defendant by their testator, *B. B.*, it was alleged, that, "the defendant being indebted, he the said *B. B.* promised to pay the said *B. B.*:"—*Held*, that the words "the said *B. B.*:" before "pro-

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duced," might be considered as surplusage. *Burton v. Nancolas*, 552

FALSE IMPRISONMENT.

See TRESPASS.

FEME COVERT.

See COPYHOLD.

FINE.

1. Where premises were described in a fine to be in the parish of *A.*, whereas they were in fact in the parish of *B.*, being in a certain street, part of which was in *A.*, and part in *B.*; and the deed to lead the uses stated the premises to be in that street, in the parish of *A.* The Court, on an affidavit of the facts, allowed the fine to be amended, by altering the name of the parish from *A.* to *B.* *Hawker*, deforciant, 485

FOREIGN JUDGMENT.

1. A foreign judgment is *prima facie* evidence of a debt, and that every thing was done in the Court in which it was obtained, that was necessary to support it. *Arnott v. Redfern*, 209

FRAUDS, STATUTE OF.

1. The defendant was a subscriber to a work which was to be published in *twenty-four monthly numbers*. He received eight numbers, and afterwards had notice from the publisher, that the others were ready for him, if he would send for them. On his refusal to take the remaining sixteen, the plaintiff, the assignee of the publisher, who had become bankrupt, sued him for the value of the whole. The Jury having found a verdict for the plaintiff, for the price of the eight numbers received by the defendant—The Court refused to disturb it, although it was contended that the contract was entire, and void under the

4th section of the statute of frauds, it not having been reduced into writing, or to be performed within a year. *Mavor v. Pyne*, 2

FREIGHT.

1. By bills of lading, goods were made deliverable "to C. & Co., or to assigns, he or they paying freight for the same." C. & Co., indorsed the bills to the defendants, brokers, and afterwards became bankrupt. The brokers for the ship, in ignorance of the insolvency of C. & Co., and of their having indorsed the bills to the defendants, applied to the former for payment of freight; and afterwards sued the defendants:—*Held*, that the latter were liable for the freight, on a general *indebitatus assumpsit*:—*Held* also, that a party who obtains goods under a bill of lading, impliedly contracts to pay the freight. *Dougall v. Kemble*, 250

GAMING.

1. In a declaration in debt, *quidam*, on the statute of gaming, the offence was alleged to have been committed "at the parish of St. James, in the county of Middlesex:—*Held* (on error) sufficient, although there are in Middlesex two parishes of St. James, viz. St. James, Westminster, and St. James, Clerkenwell—the latter never being described without the addition of "Clerkenwell." *Taylor, q. t. v. Willans*, 448

2. In debt on the statute of Anne, for money lost at play, the declaration averred that the party did, "at one and the same sitting, by playing at a certain game called 'Rouge et Noir,' lose to the defendant a large sum, &c., and did then and there pay the same to the defendant"—without alleging that he played with the defendant:—*Held* sufficient. *Ibid.*

INSOLVENT DEBTOR.

HIGHWAY.

See VESTRY.

1. In an action on the case for an injury resulting to the plaintiff from falling down an unprotected area, the declaration stated, that the defendant was possessed of the premises, and that they were adjoining "a certain common and public street and highway." It appeared that the defendant had agreed with the owner of the premises (two carcasses of houses) to finish one of them, for doing which he was to have the other; and that workmen employed by him were then actually at work upon them; but it did not appear that any conveyance had been made to him. The street in question, which had been forming for six years, and led from a public street to a new road across fields, over which the way had been publicly used for five or six years, was unfinished, one half only being lighted, the other neither lighted nor paved: but the inhabitants had paid the highway and paving rates:—*Held*, that this was sufficient evidence to go to a Jury of a possession in the defendant, and of a dedication of the street to the public. *Jarvis v. Dean*, 364

INFANT.

1. An infant defendant having appeared by attorney, the Court ordered the appearance to be struck out of the filacer's book, and that, if the defendant should appear by guardian, his plea should be made conformable thereto; and that the defendant should pay the plaintiff's costs. *Paget v. Thompson*, 504

INFERIOR COURT.

See Costs, 1.

INSOLVENT DEBTOR.

1. The provisional assignee of the

Insolvent Debtors' Court, may maintain ejectment for the estate of an insolvent assigned to him under the provisions of the statutes 1 Geo. 4, c. 119, and 3 Geo. 4, c. 123, without the previous approbation of one of the commissioners, or order of the Insolvent Court. *Doe d. Clark v. Spencer*,
7

2. The Court refused to stay the proceedings in an action of ejectment brought on the demise of the provisional assignee of the Insolvent Debtors' Court, on the ground of the absence of proof of the consent of the major part of the creditors, and approbation of one of the commissioners, or order of the Court, as required by the statutes 1 Geo. 4, c. 119, s. 11, and 3 Geo. 4, c. 123, s. 2. *Doe d. Clark v. Spencer*, 232

3. A. agreed with B. for the sale of a copyhold estate, which had previously, by mistake, been surrendered to C. A. was afterwards arrested, and discharged under the Insolvent Debtors' Act. Subsequently to A.'s discharge, the mistake being discovered, C. surrendered back the estate to A., who immediately surrendered to B., the purchaser; the consideration-money being paid to the defendant, the attorney of A., to whom he had given a bond for 40*l.*, for money borrowed, which, together with the amount of the bill of costs due to him from A., it was agreed he should retain out of the produce of the estate. The assignee of A. sued the defendant for the amount received by him, as money had and received to his use:—*Held*, that, although the legal estate in the copyhold was not in the insolvent at the time of his discharge, by reason of the erroneous surrender to C., he had still such an equitable interest in it as would pass by the assignment:—*Held* also, that the defendant had an equitable lien on the purchase-money in his hands, for the

amount of the bond given to him by the insolvent, and also for his bill of costs. *Twiss v. White*, 418

INSPECTION AND PRODUCTION OF PAPERS.

See EVIDENCE.

1. In covenant, on articles of agreement under seal, the plaintiff alleged in his declaration that the deed was lost, and proved, that two parts were executed; that the part executed by him was delivered to the defendants, and that the part executed by them was delivered to him, and duly stamped, previously to the loss. At the trial, the plaintiff offered in evidence a draft or copy of the deed; but, he having given the defendants notice to produce their part, they did so:—*Held*, that, although it was the best, still it was only secondary evidence of the contents of the lost deed, and might therefore be received without a stamp. *Munn v. Godbold*, 49

INSURANCE.

1. A policy of assurance, underwritten by a company of several ship-owners, who "did severally and respectively, but not jointly or in partnership, or the one for the other of them, but each only in his own name, and on his own account, mutually agree to insure each other's ships for one year, is not illegal under the statute 6 Geo. 1, c. 18. *Strong v. Harvey*, 72

2. By a regulation of an assurance company, which was indorsed on and made part of the policy, it was provided "that, in case of loss or average, the same should be paid for at two months from adjustment." The plaintiff in his declaration alleged that he was always ready and willing to adjust, but that the defendant and the committee refused to do so:—*Held*, that the adjustment was not a

condition precedent, but that the plaintiff was entitled to recover on proof that he applied for the adjustment. *Ibid.*

3. In an action on a policy of assurance by a society of mutual underwriters, on the back of which policy were indorsed the rules and regulations of the society, which formed the entire consideration for the assurance, and were declared (by the last of them) to be as binding on the parties as if made a component part of the policy; the plaintiff, in his declaration, omitted to set out the regulations, and the evidence adduced at the trial only tended to establish a contract founded on them:—*Held*, that the declaration was insufficient, and not supported by the evidence. *Strong v. Rule*, 86

INTEREST OF MONEY.

1. In whatever form a debt accrues, whether on a contract bearing interest, or otherwise, if it has been wrongfully withheld from the plaintiff, he using means to obtain it, the Jury may give interest upon it, in the shape of damages for the unjust detention: *Arnott v. Redfern*, 209

JOINDER IN ACTION.

See LIBEL.

PARTNERS.

LANDLORD AND TENANT.

See COVENANT.

DISTRESS.

EJECTMENT.

1. The plaintiff took possession of premises under an agreement for a lease to be granted to him for a term of ten years, at a yearly rent, payable half-yearly. No lease was executed, nor was the quantum of rent to be paid ascertained; but the plaintiff occupied under the agreement for three years, paying rent for two:—*Held*, that this created a tenancy from year

to year, and entitled the landlord to distrain for the arrears due, at the rate previously paid. *Knight v. Bennett*, 222

2. By the custom of the country, the tenant was to have the use of the barns, gate-houses, &c., of the farm, for a certain period after the end of the term, for the purpose of threshing out corn and foddering cattle. The tenancy was determined at Michaelmas, and the landlord, in January following, distrained a corn-rick for the rent due at Michaelmas, he having in the mean time obtained an injunction to restrain the tenant from carrying off the premises corn in the straw:—*Held*, that the holding by the tenant under the custom, though involuntary, was a prolongation of the original term; and that the landlord was entitled to distrain. *Knight v. Bennett*, 227

3. The defendant took premises for a year certain, but quitted at the end of the first quarter. The plaintiff then let the premises, for a portion of the remaining three quarters, to another tenant, at a less rent; and afterwards sued the defendant for the difference:—*Held*, that, by re-letting the premises, the plaintiff had assented to the determination of the original tenancy, and dispensed with the necessity of a legal surrender. *Wells v. Atcheson*, 379

4. An acknowledgment of title by a tenant, in one who claims as heir-at-law of the person under whom the tenant had previously held, will not preclude the latter from calling in question the title of the claimant, under a plea of *non tenuit*, if it appear that such acknowledgment proceeded from a misrepresentation of a misapprehension of the nature of the title set up. *Gregory v. Doidge*, 394

LEASE.

See LANDLORD AND TENANT.

LIMITATION OF ACTION.

LIBEL.

See PLEADING, 4.

SLANDER.

1. An action will not lie for a libel imputing to a party fraud in his conduct, touching an illegal transaction; but, if the publication goes further, and conveys an imputation on the party, *dehors* such transaction, it is libellous. *Yrisarri v. Clement*, 308

2. A libel stated, that "the plaintiff lost no time in transferring himself, together with 200,000*l.* sterling of *John Bull's* money, to *Paris*, where he now out-tops princes in his style of living." The innuendo to this was, "meaning that the plaintiff had defrauded *English* subjects of 200,000*l.*:"—*Held*, that the innuendo gave the words of the libel too extended a meaning: and that the libel did not impute to the plaintiff the commission of a fraud upon *English* subjects. *Ibid.*

3. Partners may join in an action for a libel published of them in the way of their trade: and *semble*, that, in such case, the declaration need not aver special damage. *Forster v. Lawson*, 360

LIEN.

See INSOLVENT DEBTOR, 3.

1. A mare having been placed with a livery stable-keeper, who advanced money to the owner; it was agreed that she should remain as a security for the re-payment of the sum advanced, and for the expenses of her keep:—*Held*, that the stable-keeper had a lien on the mare. *Donatty v. Crowther*, 479

LIMITATION OF ACTION.

1. In trover against the treasurer of the *West India Dock Company*, for sugars deposited in the company's warehouses:—*Held*, that the treasurer was within the protection of the 185th section of the 39 *Geo.* 3, c. 69, and

LIVERY STABLE KEEPER. 603

entitled to a verdict, the action not having been commenced against him within the time limited by that clause, notwithstanding his having delivered up the sugars to adverse claimants, under a bond of indemnity. *Sellick v. Smith*, 459

LIMITATIONS, STATUTE OF.

1. A debtor to a bankrupt's estate cannot, in an action brought against him by the assignee, set up the statute of limitations as an objection to the petitioning creditor's debt. *Mavor v. Pyne*, 2

2. In *assumpsit* for money lent, the defendant pleaded *actio non accrevit infra sex annos*, and, on his being arrested, he said to the sheriff's officer, "I know I owe the money, but the bill I gave is on a three-penny receipt stamp, and now I am arrested I will never pay:"—*Held*, that this was not such an acknowledgment of the debt as would take the case out of the statute of limitations. *A'Court v. Cross*, 198

3. In *assumpsit* for goods sold, to a plea of the statute of limitations, on which issue was joined, the plaintiff proved, that, three years after the original cause of action accrued, and within six years of the commencement of the suit, the defendant, on being asked for payment, said, that he could not pay then, but that he would do so as soon as he was able:—*Held*, by Lord Chief Justice *Best* and Mr. Justice *Gaselee*, (*diss.* Mr. Justice *Park*, and Mr. Justice *Burrough*), that this was a conditional promise only, and that it did not take the case out of the statute, unless the plaintiff was prepared to prove the defendant's ability to pay. *Scales v. Jacob*, 553

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See BANKRUPT, 2.

LIEN.

PAYMENT.

MALICIOUS ARREST.
See ACTION ON THE CASE, 1.

MEMORIAL.
See ARREST.

MISNOMER.
See PRACTICE, 1, 4, 5, 15.

MONEY PAID.
See ASSUMPSIT.

MORTGAGE.
See EJECTMENT, 5.

PARTNERS.
See INSURANCE.
LIBEL.

1. Several persons jointly agreed to establish a stage-coach, each to horse it one stage. For carrying this agreement into effect, the parties bound themselves each to the other, to pay to the plaintiff, in case of default, certain penalties, for which he alone was to be empowered to sue; the amount of such penalties to be divided among all the parties to the agreement who should not have subjected themselves to any penalty, to the exclusion of the defaulter.—*Held*, that the plaintiff alone might maintain an action for a breach of the agreement, and that the other parties need not join. *Radenhurst v. Bates*, 421

PAYMENT.

1. To prove the payment of a check for 100*l.*, the loan of which constituted the petitioning creditor's debt, it was shewn, that the check was in the hands of the drawer; and that, on the day after the date of the check, his bankers had paid to the bankers of the bankrupt 100*l.* on his account. The petitioning creditor was one of the assignees of the bankrupt; and, in that character, had possession of all his papers:—*Held*, that, under these circumstances, the mere fact of his having this check, was not

PLEADING.

evidence of its payment. *Blundy v. Crossley*, 327

PENALTY.
See PARTNERS.

PLEADING.

See ACTION ON THE CASE, 1.

AGREEMENT.

AMENDMENT.

INSURANCE, 2, 3.

LIBEL.

SLANDER.

WARRANTY.

1. Trespass for breaking open the outer-door of the plaintiff's dwelling-house, and entering therein, &c. Plea, justifying the entry, generally, under a *pluries f. fa.* Demurrer, assigning for cause, that in the plea it was not averred that the outer-door was open at the time the defendants entered under the writ:—*Held*, that the plea was bad. *Buckenham v. Francis*, 40

2. In covenant, the plaintiff in his declaration (after *proferri*) averred, that the defendants, for the considerations in the deed contained, covenanted that they would not do certain acts. The defendants pleaded, that, as the performance of the covenants in the indenture mentioned, would, for a term, prevent them from carrying on their trade, they were in restraint of trade, and illegal:—*Held*, that, as the defendants had not cravedoyer of the deed, nor demurred to the declaration on account of any supposed insufficiency of consideration in the deed, as set out therein, the Court would (the covenants being reasonable) presume that the deed disclosed a sufficient legal consideration. *Homer v. Ashford*, 91

3. The plaintiff prescribed for a right of sole pasture "from the feast of St. Thomas until the 18th April, in every year;—*Held*, that, the right claimed being a prescriptive right, its commencement and conclusion must have reference to St. Thomas's day,

old stile; and that the description of "the feast of St. Thomas" generally, was sufficient. *Smith v. Flower*, 264

4. In a declaration for a libel published concerning the plaintiff as *Envoy of the state of Chili*, it was alleged, by way of inducement, that the plaintiff was the Envoy appointed by the state of *Chili*:—*Held*, that the libel, on the face of it, sufficiently admitted *Chili* to be a state, and the plaintiff to be the Envoy of that state, to support the action. *Yrisarri v. Clement*, 308

5. In *assumpsit*, a verdict was entered for the plaintiff on twelve counts of the declaration, and the Jury were discharged from finding any verdict on the other eight counts, the issues on which were immaterial. The Court, on error, refused to reverse the judgment, on the ground that it was not stated on the record, that the Jury were discharged with the consent of the parties. *Powell v. Sonnett*, 330

6. A writ of entry was returnable, and an appearance entered thereon, in *Michaelmas* Term. The count was intitled of *Hilary* Term, and was delivered on the 10th *February*. The Court set aside the count, for irregularity, and refused to allow it to be amended. *Rowles, Demandant; Lawrence, Tenant*, 338

7. In a declaration against the drawer, on a bill of exchange accepted payable at a banker's generally, it is only necessary to aver a presentment at that place. *De Bergareche v. Pillin*, 350

8. In debt on a bail-bond, the declaration need not contain averments that there was an affidavit of debt, or that the sum sworn to was indorsed on the writ. *Dorrington v. Bricknell*, 445

9. In a declaration in debt, *quidam*, on the statute of gaming, the offence was alleged to have been com-

mitted "at the parish of St. James, in the county of *Middlesex*:"—*Held*, (on error) sufficient, although there are in *Middlesex* two parishes of St. James, viz. St. James, *Westminster*, and St. James, *Clerkenwell*—the latter never being described without the addition of "*Clerkenwell*." *Taylor, q. t., v. Willans*, 448

10. In debt on the statute of *Anne*, for money lost at play, the declaration averred that the party did, "at one and the same sitting, by playing at a certain game called '*Rouge et Noir*,' lose to the defendant a large sum, &c., and did then and there pay the same to the defendant"—without alleging that he played *with* the defendant:—*Held*, sufficient. *Ibid.*

11. In *assumpsit* for the breach of an agreement, a clause contained therein, although illegal, as being in restraint of trade, if it form no part of the consideration, need not be set out in the declaration. *McAllen v. Churchill*, 483

12. If a bill of exchange be drawn payable at a particular place, and a party accept it, without stating that he accepts it there, and *not elsewhere*, according to the terms of the statute 1 & 2 *Geo. 4*, c. 78, s. 1:—*Held*, that this must be taken as a general acceptance, and no averment of presentment for payment at that place is necessary. *Selby v. Eden*, 511

13. The Court will not allow inconsistent pleas to be pleaded together, unless, at the time of the application for leave to plead several matters, an affidavit be made, that such pleas are necessary for the justice of the case. *Shaw v. Russell*, 540

14. A declaration in *assumpsit* stated, that, in consideration that the plaintiff had delivered a watch to the defendant, to be repaired for certain reward, he undertook to repair and re-deliver it to the plaintiff. *Breach*—non-delivery. *Proof*, that the de-

defendant having repaired the watch, tendered it to the plaintiff, who desired him to deliver it to his uncle U., who would pay him for it; but, that the defendant, by mistake, delivered it to another uncle, from whom it was stolen:—*Held*, that the plaintiff was entitled to recover the value of the watch, and that there was no substantial variance between the declaration and the evidence; although it was objected, that the action should have been founded on a new contract to deliver the watch to the plaintiff's uncle. *Wilson v. Powis*, 548

15. In a declaration of *assumpsit* by executors, in a count for money paid to and for the use of the defendant by their testator, B. B., it was alleged, that "the defendant being indebted, he the said B. B. promised to pay the said B. B.:"—*Held*, that the words "the said B. B." before "promised," might be considered as surplusage. *Buxton v. Nancotlas*, 552

POSTEA.

See AMENDMENT.

POWER.

1. An estate was devised to trustees (subject to a term of years), in trust for the eldest son of Sir H. E., for life, without impeachment of waste, remainders over, with power to the trustees to revoke the uses in the will, and to declare other uses, and, at the request and by the direction and appointment of any person in possession as tenant for life, to sell, and to lay out the proceeds of such sale in the purchase of other lands, which they were to hold to the same uses. The surviving trustee, at the request of Sir H. C. E., the first tenant for life, in pursuance of the power, sold the estate, exclusive of the timber growing on it, and Sir H. C. E. sold the

timber; both being conveyed to the purchaser by the same deed:—*Held*, that Sir H. C. E., the tenant for life, having but a qualified interest in the timber, the surviving trustee, in conveying the estate exclusive of the timber, had not well executed the power. *Cholmeley v. Paxton*, 17

PRACTICE.

See AFFIDAVIT TO HOLD TO BAIL.

AMENDMENT.

ATTACHMENT.

ATTORNEY.

AWARD.

BAIL.

BAIL BOND.

COSTS.

EJECTMENT.

VENUE.

1. If the defendant's surname be mis-stated in a writ, the Court will not set aside the process on motion, but will leave the defendant to his plea in abatement. *Sumner v. Batson*, 39

2. A plaintiff may be nonsuited after a plea of tender. Therefore, where the defendant pleaded *non-assumpsit* as to part, and a tender as to the residue, which he paid into Court, and the plaintiff took out; and the defendant took down the record by proviso, and the plaintiff did not appear:—*Held*, that the defendant was not entitled to a verdict: and the Court, on motion, ordered it to be set aside and a nonsuit entered. *Anderdon v. Shaw*, 44

3. A motion for an attachment against a person subpoenaed as a witness, for not attending at a trial, must be made within the term succeeding the trial, and a copy of such subpoena must be delivered personally at the time of service. *Thorne v. Gaborne*, 55

4. The defendant having been arrested by the name of Stephen T. Silk, signed a bail-bond in his full

name, *Stephen Thomas Silk*:—The Court ordered the bail-bond to be cancelled, on the defendant's undertaking to bring no action; but observed, that, in future, they would, in such cases, leave the party to his plea in abatement. *Lake v. Silk*, 57

5. The defendant's name was *Tidmarsh*; he was arrested as *Tinmarsh*:—The Court refused to set aside the writ, but left him to plead. *Homan v. Tidmarsh*, 231

6. On the trial of a writ of right, the tenant must begin, notwithstanding the tender of the *demi-mark*. *Tooth*, Demandant; *Bagwell*, Tenant, 349

7. The Court will not accede to an application for a trial at bar, unless the specific difficulties of the case are pointed out to them at the time. *Angell*, Demandant; *Angell*, Tenant, 278

8. An attorney having acted for both parties in a suit, the Court ordered the proceedings to be set aside, and the attorney to pay the costs of the cause, and of the motion. *Berry v. Jenkins*, 308

9. The defendant obtained a rule to change the *venue* from *London* to *Lancashire*, on the usual affidavit. The affidavit of the plaintiff, on shewing cause, stated that the action was brought on a contract for the purchase of cotton at *Trieste*, to be delivered at *Liverpool*. The Court discharged the rule. *Wilkinson v. Tattersal*, 328

10. The defendant wilfully avoiding the service of process, the plaintiff sent it to her by the post, inclosed in a letter, which she refused to receive. He entered an appearance for her, and afterwards signed judgment.—The Court set aside the judgment, without costs. *Ridpath v. Williams*, 333

11. A writ of entry was returnable, and an appearance entered thereon, in

Michaelmas Term. The count was intitled of *Hilary* Term, and was delivered on the 10th *February*. The Court set aside the count for irregularity, and refused to allow it to be amended. *Rowles*, Demandant; *Lawrence*, Tenant, 338

12. Bail cannot justify for a defendant brought into Court to be charged in execution in the cause. *Bircham v. Chambers*, 343

13. The defendant was held to bail on a bill of exchange. The Court refused to order the bail-bond to be delivered up to be cancelled, on an affidavit that the bill was founded and given on an usurious transaction. *Isaacs v. Silver*, 348

14. A plaintiff may proceed by *distringas* to compel the appearance of a defendant who resides abroad, but carries on trade in this country. *Hornby v. Bowling*, 359

15. In a writ of entry, the demandant took the record down to the Assizes. The cause was made a *re-manet*. At the next Assizes, the tenant alone appeared.—The Court refused to allow him to sign judgment as in case of a nonsuit. *Denman*, Demandant; *Bull*, Tenant, 443

16. The Court refused to set aside a declaration, on the ground of a variance between the writ and declaration—the defendant being called *John* in the former, and *James* in the latter. *Garner v. Weller*, 457

17. The defendant having been arrested in *Middlesex*, original bail were put in there; and afterwards added bail were taken before a commissioner in the country, and put in with the filacer for *Middlesex*:—Held regular; the commissioner in the country having full authority to act by virtue of his commission. *Moore v. Kenrick*, 498

18. The Court will not stay proceedings in an action of trover, on the terms of the defendant's delivering

up the goods converted to the plaintiff, or paying their value, where such value is not ascertained. *Tucker v. Wright*, 500

19. An infant defendant having appeared by attorney, the Court ordered the appearance to be struck out of the filacer's book, and that, if the defendant should appear by guardian, his plea should be made conformable thereto; and that the defendant should pay the plaintiff's costs. *Paget v. Thompson*, 504

20. The Court will not allow inconsistent pleas to be pleaded together, unless, at the time of the application for leave to plead several matters, an affidavit be made, that such pleas are necessary for the justice of the case. *Shaw v. Russell*, 540

PREBENDARY.

See ADVOWSON.

PRESCRIPTION.

See PLEADING, 3.

PRESENTATION.

See ADVOWSON.

PROCESS.

See PRACTICE.

PROVISIONAL ASSIGNEE.

See INSOLVENT DEBTOR.

PUFFER.

See AUCTION.

QUARE IMPEDIT.

1. In *Quare Impedit*, a defendant is not entitled to costs on a judgment as in case of a nonsuit. *Wyndome v. Carlisle (Bishop)*, 289

RECOVERY.

1. The Court permitted a recovery

to be amended by substituting "the township of A., in the parish of K.," for "the parish of A." *Kinderley*, demandant; *Graham*, tenant; *Ogle*, vouchee, 249

2. Where the vouchee became insane after the execution of the warrant of attorney, but before the perfecting of the recovery—The Court refused to allow it to pass. —, Demandant; *Russell*, Tenant; *Wallcott*, Vouchee, 307

3. The Court refused to allow a recovery to be amended by the insertion in the *præcipe* of the description of the parcels intended to pass, which had been omitted by mistake. *Oddie*, demandant; *Foster*, Tenant; *Plymouth (Earl)*, Vouchee, 340

4. If one of several vouchees appear personally in Court, and the others by attorney, the name of the former need not be inserted in the *dedimus*, or warrant of attorney. *Simmons*, Vouchee, 485

REGULÆ GENERALES, 332, 586

RELEASE.

See ATTORNEY, 2.

RENT.

See LANDLORD AND TENANT.

RULES OF COURT.

See REGULÆ GENERALES.

RIGHT, WRIT OF.

See WRIT OF RIGHT.

SALE.

See AUCTION.

SET OFF.

See INSOLVENT DEBTOR.

STAMPS.

SHERIFF.

See WRIT OF RIGHT.

SHIP OWNER.

See INSURANCE.

SLANDER.

1. In slander, the declaration stated, that the plaintiff was an auctioneer and appraiser, that the defendant had employed him as an appraiser to value certain goods, and that he spoke of him, and his conduct as to such valuation—"He is a damned rascal; he has cheated me out of 100*l.* on the valuation:"—*Held*, sufficient after verdict. *Bryant v. Loxton*, 344

2. Partners may join in an action for slander spoken or published of them in the way of their trade: and *semble*, that, in such case, the declaration need not aver special damage. *Forster v. Lawson*, 360

SPECIAL JURY.

See COSTS.

STAMPS.

1. In covenant on articles of agreement under seal, the plaintiff alleged in his declaration that the deed was lost, and proved that two parts were executed, that the part executed by him was delivered to the defendants, and that the part executed by them was delivered to him, and duly stamped previously to the loss. At the trial, the plaintiff offered in evidence a draft or copy of the deed; but, he having given the defendants notice to produce their part, they did so:—*Held*, that, although it was the best, still that it was only secondary evidence of the contents of the lost deed, and might, therefore, be received without a stamp. *Munn v. Godbold*, 49

STATUTES.

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STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

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Edward VI.

2 & 3. c. 13. Tithes. 128

James I.

4. c. 3. Costs. 289

21. c. 16. Limitation of Actions: 2, 198

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29. c. 3. Frauds, Statute of. 2

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4 & 5. c. 4. Bail, Recognizance. 499

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8. c. 14. Distress, Rent. 227

9. c. 14. Gaming. 448

George I.

6. c. 18. Insurance. 72, 81

12. c. 29. Affidavit of Debt, Process. 333, 445

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4. c. 28. Landlord and Tenant, Distress. 263

6. c. 31. Bastards. 320

7. c. 20. Ejectment, Mortgage. 491

14. c. 17. Judgment of Nonsuit, Costs. 288, 444

24. c. 18. Special Jury, Costs. 511

24. c. 23. Holydays. 264-7

George III.

13. c. 78. Highways. 400

17. c. 50. Auction. 283

39. c. lxxix. West India Dock Company. 482

39 & 40. c. 104. London Court of Requests. 14

46. c. 135. Bankrupt. 3

53. c. 141. Annuity. 28

55. c. 184. Stamps. 54

TROVER.

other paper. . . Some time afterwards, the note was received at the banking-house of the defendants in the country, where it had been presented for change, by a stranger, of whom no questions were asked as to the manner in which he became possessed of it. In trover to recover the value, the Judge left it to the Jury to say whether or not due notice of the robbery had been given by the plaintiffs, and whether or not, under the circumstances, due caution had been observed by the defendants, in taking the note. The Jury thought that the defendants had not exercised due caution, and accordingly found for the plaintiffs:—The Court held that this direction was proper, and refused to disturb the verdict. *Snow v. Peacock*, 886

2. A party taking a bank-note in payment of a bet from a stranger on a race-course, is not bound to use the same precaution as would be requisite if the note were taken by a tradesman. *Snow v. Sadler*, 506

3. The plaintiff was robbed of a pocket-book containing, amongst other things, a bill of exchange. In advertising the loss, he merely stated that "the pocket-book contained papers of no use to any person but the owner." The bill was, shortly afterwards, presented at the banking-house of the defendants, by a stranger, who stated that he was the son of the indorser. The defendants discounted it. In trover, the Judge left it to the Jury to say—first, whether they thought that the plaintiff had done all that his duty required of him, in advertising and making known his loss—secondly, whether, if due diligence had been used by the plaintiff in this respect, the defendants had acted *bona fide*, and used due caution, in receiving the bill; telling them, that, if they were of opinion that the plaintiff had failed in giving proper notice of the robbery,

VARIANCE.

611.

the defendants were entitled to a verdict. The Jury having found for the defendants—The Court refused to disturb the verdict, holding the direction proper. *Beckwith v. Corral*, 335

4. The plaintiff, residing abroad, shipped sugars under a bill of lading addressed to A. in London, directing him to sell the sugars on the plaintiff's account, and place the net proceeds to the credit of B. to whom the plaintiff was indebted for advances made previously to the shipment. The invoice stated the plaintiff to be the shipper. A., on the arrival of the sugars, pledged them to the defendants for advances made by them to him; and having become bankrupt, the plaintiff authorized an agent to demand the sugars of the defendants; but they sold them, and the proceeds were demanded after the sale by the agent, with the authority of the plaintiff:—Held, that the latter had a sufficient title in the sugars to sue the defendants in trover; as the right of possession was in him; as B. had only an equitable interest; and that the defendants, by selling the sugars after the demand by the plaintiff's agent, were guilty of a conversion. *Settick v. Smith*, 469

5. The Court will not stay proceedings in an action of trover, on the terms of the defendant's delivering up the goods converted, to the plaintiff, or paying their value, where such value is not ascertained. *Tucker v. Wright*, 500

UNDERWRITER.

See INSURANCE.

USE AND OCCUPATION.

See LANDLORD AND TENANT, 3.

VARIANCE.

See PLEADING,
PRACTICE.

1. The plaintiff prescribed for a

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right of sole pasture "from the feast of St. Thomas until the 18th April, in every year:"—*Held*, that, the right claimed being a prescriptive right, its commencement and conclusion must have reference to St. Thomas's day, old stile; and that the description of "the feast of St. Thomas" generally, was sufficient. *Smith v. Flower*, 264

2. In *assumpsit* on a warranty of a horse, the declaration stated, that, in consideration that the plaintiff would purchase of the defendant a horse, at a certain price, *to wit*, the price of 55*l.*, the defendant undertook that the horse was sound.. The proof was, that the price agreed upon was 55*l.*, and that the defendant was to return 1*l.*, if the plaintiff did not make a profit of 4*l.* or 5*l.*, on the re-sale of the horse:—*Held*, a fatal variance—*dissentiente Gaselee, J.* *Blythe v. Bampton*, 887

3. A declaration in *assumpsit*, stated, that, in consideration that the plaintiff had delivered a watch to the defendant, to be repaired for certain reward, he undertook to repair and re-deliver it to the plaintiff. *Breach*—non-delivery. *Proof*, that the defendant having repaired the watch, tendered it to the plaintiff, who desired him to deliver it to his uncle *U.*, who would pay him for it; but, that the defendant, by mistake, delivered it to another uncle, from whom it was stolen:—*Held*, that the plaintiff was entitled to recover the value of the watch, and that there was no substantial variance between the declaration and the evidence; although it was objected, that the action should have been founded on the new contract to deliver the watch to the plaintiff's uncle. *Wilson v. Powis*, 543

VENDOR AND PURCHASER.

1. The plaintiff put up a horse to sale at a public auction, and sent his servant to bid for him to enhance the

VESTRY.

price. The last *bond fide* bidding was 12*l.*, and the horse was ultimately knocked down at 29*l.*:—*Held*, that the bidding by the servant was a fraud upon the purchaser, and, consequently, that the sale was void. *Crowder v. Austin*, 283

VENUE.

1. The defendant obtained a rule to change the *venue* from *London* to *Lancashire*, on the usual affidavit. The affidavit of the plaintiff, on shewing cause, stated that the action was brought on a contract for the purchase of cotton at *Trieste*, to be delivered at *Liverpool*. The Court discharged the rule. *Wilkinson v. Tattersal*, 328

2. Covenant by the assignee of the lessee of a term, is a local action; and the *venue* must be laid in the county where the lands are situate. The Mayor, &c. of *Berwick-upon-Tweed v. Shanks*, 372

3. The Court will not allow the *venue* to be changed after plea pleaded, unless the justice of the case clearly requires it. *Bailey v. Beaumont*, 384

4. In an action by a clergyman against a farmer, for improperly setting out his tithes, the Jury found a verdict for the defendant, contrary to the opinion of the Judge. The Court directed a new trial; and anonymous letters having been inserted in the newspapers of the county where the cause was tried, reflecting on the character of the plaintiff, as a clergyman:—the Court ordered the *venue* to be changed to a third county. *Walker v. Ridgway*, 486

VESTRY.

1. At a special vestry, it was resolved, "that an indictment preferred against the parish for non-repair

WITNESS.

of a highway, should be opposed; and that the surveyors be desired to take the necessary steps for carrying this resolution into effect."—*Held*, that the inhabitants who had signed the resolutions were not personally responsible for the costs of the attorney employed by the surveyors for this purpose. *Sprott v. Powell*, 398

WARRANT.

See TRESPASS.

WARRANTY.

1. In *assumpsit* on a warranty of a horse, the declaration stated, that, in consideration that the plaintiff would purchase of the defendant a horse, at a certain price, *to wit*, the price of 55*l.*, the defendant undertook that the horse was sound. The proof was, that the price agreed upon was 55*l.*, and that the defendant was to return 1*l.*, if the plaintiff did not make a profit of 4*l.* or 5*l.*, on the re-sale of the horse:—*Held*, a fatal variance, (*dissentiente Gaselee, J.*) *Blythe v. Hampton*, 387

WAY.

See ACTION ON THE CASE.

WEST INDIA DOCK COMPANY.

See LIMITATION OF ACTION.

WITNESS.

See ATTORNEY, 2.

COSTS.

DEED.

1. A motion for an attachment against a person subpoenaed as a witness, for not attending at a trial, must be made within the term succeeding the trial, and a copy of such subpoena must be delivered personally to him at the time of service. *Thorpe v. Gisbourne*, 55

WRIT OF RIGHT. 613

WRIT OF ENTRY.

1. A writ of entry was returnable, and an appearance entered thereon, in *Michaelmas* Term. The count was intitled of *Hilary* Term, and was delivered on the 10th *February*. The Court set aside the count for irregularity, and refused to allow it to be amended. *Rowles*, Demandant; *Lawrence*, Tenant, 338

2. In a writ of entry, the demandant took the record down to the *Assizes*. The cause was made a *remanet*. At the next *Assizes*, the tenant alone appeared.—The Court refused to allow him to sign judgment as in case of a nonsuit. *Denman*, Demandant; *Bull*, Tenant, 443

WRIT OF RIGHT.

1. On the day appointed for the trial of a writ of right, the Sheriff returned that one of the knights was, from illness, incapable of attending; this was confirmed by the affidavit of his medical attendant.—The Court allowed a *venire* to issue for summoning another knight, and a *habeas corpora* to compel the appearance of the three knights who had already appeared, and of the recognitors, on a subsequent day. *Tooth*, Demandant; *Bagwell*, Tenant, 236

2. In a writ of right, the Sheriff returned to the precept for summoning four knights to choose the grand assize, that he had caused to be summoned *E. P. Esq.*, *D. S. Esq.*, *S. H. Esq.*, and *T. A. Esq.*, four lawful knights of his county:—*Held*, that this return was not traversable. *Angell*, Demandant; *Angell*, Tenant, 272

3. On the trial of a writ of right, the tenant must begin, notwithstanding the tender of the *demi-mark*. *Tooth*, Demandant; *Bagwell*, Tenant, 349

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